(7)

No. 91-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

VOLUME I OF II (pages 1-214)

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PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1991
CERTIORARI GRANTED DECEMBER 9, 1991

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* Entries marked with an asterisk (*) are included in the appendix to the petition for *certiorari*.

RELEVANT DOCKET ENTRIES

BURDICK v. TAKUSHI, et al.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Docket No. 86-582 - CONSOLIDATED WITH 88-00365

DATE	NR	PROCEEDINGS
1986		
Aug. 21	1	Complaint for Declaratory and Injunctive Relief; Exhibit 1; Summons Summons Issued
Sep. 11	6	Notice of Hearing of Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Memorandum in Support of Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Affidavit of Alan B. Burdick; Exhibits 1-3; Proposed Order
15	7	Answer to Complaint for Declaratory and Injunctive Relief
22	8	Memorandum in Opposition to Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Affidavit of Dwayne D. Yoshina on behalf of defts
25	9	Plaintiff's Memorandum in Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment and Permanent Injunctive Relief
29	10	Order Granting Motion for Summary

		Judgment and for Permanent Injunction - Plaintiff's Motion for Summary Judgment is granted. It is further ordered that the Motion for a Permanent Injunction be granted. Also the Defendants are to comply with this order by causing ballots for the November 1986 general election to provide for the casting of write in votes equal to the total number of candidates to be elected in each electoral contest, and that the Defendants provide for the counting, recording, and tabulation of such write in votes
30	11	Judgment in a Civil Case - Summary Judgment is entered in favor of Plaintiff and against Defendants. It is further Ordered that the Motion for a Permanent Injunction is granted
30	12	Notice of Appeal (By Defendants)
Oct 3	13	Notice of Motion for Stay, Suspension, or Modification of Injunction; Motion for Stay, Suspension or Modification of Injunction; Affidavit of Dwayne D. Yoshina, Exhibits "A" - "D"; Affidavit of Steven S. Michaels, Exhibits "A" - "C"
6	15	Memorandum in Opposition to Motion for Stay, Suspension, or Modification of Injunction; Affidavit of Alan B. Burdick
	16	Reply Memorandum in Support of Motion for Stay, Suspension, or Modification of Injunction on behalf of defts
7	18	Affidavit of Thomas Yamashiro - on behalf of deft

	19	Deft's Motion for Stay, Suspension or Modification of Injunction - Arguments - Motion submitted
8	20	Order Denying Motion for Stay, Suspension, or Modification of Injunction
9	21	Notice of Appeal
20	22	Order from 9th CCA - appellant's emergency motion for stay of the district court's injunction pending appeal is granted
1987		
Mar 11	24	Designation of Clerk's Record on Appeal-On Behalf of Defendants Takushi/Waihee
1988		
June 13	26	Judgment from 9th CCA - Vacated & Remanded with instructions On 5-17-88
July 6	27	Stipulation Requesting the United States District Court for the District of Hawaii to Submit Certified Questions to the Supreme Court of the State of Hawaii; Exhibit A - referred to Fong
19	28	Order Certifying Questions of Hawaii Law to the Supreme Court of the State of Hawaii
Aug 1	29	Notice of Motion; Motion for Amendment of Certification Order; Memorandum in Support of Motion for Amendment of Certification Order; Declaration of Counsel; On Behalf of Defendants; Proposed Order
4	30	Corrections to Motion for Amendment to Certification Order and to Proposed

		Order; On Behalf of Defendants
	31	Supplemental Declaration of Counsel and Exhibits; On Behalf of Defendants
5	32	Defendants' Supplemental Exhibits (Briefs in the Court of Appeals) in Support of Motion for Amendment of Certification Order; Declaration of Counsel and Exhibits "A" - "C"
11	33	Memorandum in Opposition to Motion for Amendment of Certification Order; On Behalf of Plaintiff
19	34	Reply Memorandum in Support of Motion for Amendment of Certification Order; Declaration of Counsel and Exhibits Re Erum v. Waihee, No. 87-15156 (9th Cir.); On Behalf of Defendants
26	36	Order Denying Motion for Amendment of Certification Order - court will amend its certification order as to the second paragraph on page 3
	37	Amended Certification From the United States District Court for the District of Hawaii
Oct 13	38	Order from Supreme Court State of Hawaii - purs to this order, the entire record was transmitted to them on 10-18-88
Nov 22	39	Order Consolidating Cases - with 88-00365
1989		
Jun 7	40	Withdrawal and Substitution of Counsel and Order; on behalf of pltf - Johnston & Day withdraws and Mary

		Johnston enters for Burdick
1990		
Feb 12	41	Notice of Hearing of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Memorandum in Support of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Affidavit of Alan B. Burdick; Exhibits A & B; Proposed Order; set for 3/26/90 @ 9:00 a.m.
Mar 14	43	Notice - Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief set for 3/26/9 @ 9:00 a.m., contd to 4/9/90 @ 11:15 a.m.
Mar 22	44	Oral Motion for Extension of Time to File Response to the Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief, or In the Alternative for Continuance of the Hearing is Granted. The hearing is continued until May 7, 1990 @ 3:00 p.m.
Apr 19	45	Notice of Motion; Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay; Memorandum In Support of Defendants' Counter-Motion for Summary Judgment and Conditional Motion for Stay and in Opposition to Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Declaration of Dwayne Yoshina; Proposed Orders; - on behalf of Defendants - set for 5/7/90 @ 3:00 p.m.
	46	Declaration of Steven S. Michaels Re:

		Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "A" - "D" ("Burdick Federal Appendix")
	47	Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "E" - "R" ("Erum Appellate Appendix") - on behalf of Defendants
	48	Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "S" - "T" ("Burdick State Appendix") - on behalf of Defendants
Apr 30	49	Plaintiff's Memorandum in Opposition to Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay
May 2	50	Reply Memorandum in Support of Defendants' Counter-Motion for Summary Judgment and Conditional Counter Motion for Stay
7	51	Cross Motions for Summary Judgment; Defendants' Motion for Stay - Arguments held. Motions taken under advisement
10	52	Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay
15	53	Judgment - Summary Judgment is entered in favor of Plaintiff and against Defendants. Also the Motion for Permanent Injunctive Relief is granted
June 6	54	Notice of Appeal (By Defendants)
11		Notice of Appeal sent to 9th CCA Clerk
12	55	Notice of Appeal (By Defendant-Morris Takushi, et al.)
	56	Notice of Appeal (By Defendant-Benjamin Cayetano, et al.)
13		Notices of Appeals (By Defendants-Takushi, Cayetano, et al.) sent to 9th CCA Clerk
Jul 9		Certificate of Record mailed to Clerk, 9th CCA (CA 90-15873 & 90-15876)
1991		
Aug 7	60	Judgment - 9th CCA - Reversed

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Docket No. 88-365 - CONSOLIDATED WITH 88-0582

DATE	NR	PROCEEDINGS
1988		
May 17	1	Complaint for Declaratory and Injunctive Relief; Exhibits A - D; Summons Summons Issued
June 7	5	Answer to Complaint for Declaratory and Injunctive Relief
Nov. 22	10	Order Consolidating Cases - with 86-0582 HMF
1989		
Jun 7	11	Withdrawal and Substitution of Counsel and Order; Johnston & Day withdraws for Plaintiff and Mary Johnston enters
1990		
Feb 12	12	Notice of Hearing of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Memorandum in Support of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Affidavit of Alan B. Burdick; Exhibits A & B; Proposed Order; set for 3/26/90 @ 9:00 a.m.
Apr 19	16	Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "S" - "T" ("Burdick State Appendix")
	18	Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "E" - "R" ("Erum Appellate Appendix")
	18	Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "A" - "D" ("Burdick Federal Appendix")
	19	Notice of Motion; Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay; Memorandum In Support of Defendants' Counter-Motion for Summary Judgment and Conditional Motion for Stay and in Opposition to Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Declaration of Dwayne Yoshina; Proposed Orders
Apr 30	20	Plaintiff's Memorandum in Opposition to Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay
May 2	21	Reply Memorandum in Support of Defendants' Counter-Motion for Summary Judgment and Conditional Counter Motion for Stay
7	22	Cross Motions for Summary Judgment; Defts' M/Stay - Arguments held. Motions taken under advisement
10	23	Order Granting Plaintiff's Motion for Summary Judgment and Permanent In-

		junctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay
	15 24	Judgment - Summary Judgment is entered in favor of Plaintiff and against Defendants. Also the Motion for Permanent Injunctive Relief is granted
June 6	25	Notice of Appeal (By Defendants)
	11	Notice of Appeal sent to 9th CCA Clerk, and to all counsels
	12 26	Notice of Appeal (By Defendant-Morris Takushi, et al.)
	27	Notice of Appeal (By Defendant-Benjamin Cayetano, et al.)
	13	Notices of Appeals (By Defendants-Takushi, Cayetano, et al.) sent to 9th CCA Clerk, and to all counsels
Jul 9		Certificate of Record mailed to Clerk, 9th CCA - cc: all counsel (CA 90-15873 & 90-15876)
		Certificate of Record mailed to Clerk, 9th CCA - cc: all counsel (CA 90-15877)

RELEVANT DOCKET ENTRIES

HAWAII SUPREME COURT

7/28/88	Order certifying questions of Hawaii Law to the Supreme Court of the State of HI
08/04/88	Letter from Deputy Attorney General; re: Motion for Amendment of Certification
08/30/88	Amended Certification from U.S. District Crt. to Supreme Court of Hawaii
05/12/89	Notice of Setting Case for Argument (Monday, June 26, 1989 - 9:00 A.M.)
06/07/89	Withdrawal & Substitution of Counsel and Order (Mary Blaine Johnston appears)
07/18/89	Letter from M.B. Johnston Re: Attaching Decision of 4th Circuit Court of Appeals
07/21/89	Question answered in favor of Defendants Appellees

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

86-2689

10/8/86 Docketed Cause and Entered Appearances of Counsel. [86-2689]

10/10/86 Filed Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689 emergency motion to stay further action [86-2689], to consolidate case with case(s) 86-2703. [86-2689]; served on 10/9/86. [86-2689]

10/15/86 Filed Appellee Alan B. Burdick in 86-2689's opposition to aplt emergency motion for stay, suspension, or modification of injunction pending appeal. Served on 10/14/86. [86-2689]

10/15/86 Filed order (Hug, Poole, Norris) Aplt's emergency mot. for a stay of the D.C.'s injunction pending appeal is granted. [86-2689, 86-2703] in 86-2703 [86-2689, 86-2703]

10/23/86 Filed as of 10/22/86 appellant's Civil Appeals Docketing Statement served on 10/21/86. [86-2689 86-2703]

10/24/86 Filed as 10/22/86 certificate of record on appeal. RT filed in DC 10/10/86 [86-2689 86-2703]

1/21/87 Filed order (1) these appeals (86-2689 & 86-2703) are consolidated (2) aplts shall file a brief of not more than 50 pgs on or before 3/2/87 (3) aple shall file a brief of not more than 50 pgs on or before 4/6/87 (4) aplts may file a reply brief of not more than 25 pgs within 14 days of the service date of aple's

brief. [86-2689 86-2703]

3/12/87 Filed as of 3/11/87 original and 15 copies Appellants' opening brief, 50 pages, and 5 copies excerpt of record, served on 3/9/87. [86-2689 86-2703]

4/16/87 Received original and 15 copies Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's brief of 39 pages: Served on 4/14/87. (Motion to file late brief submitted simultaneously.) [86-2689, 86-2703]

4/21/87 Filed as of 4/16/87, Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703's motion to extend time to file appellee's brief until 4/16/87 [86-2689, 86-2703]; served on 4/14/87

5/4/87 Received orig. 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689's brief of 25 pages. (Aple's brief not yet filed.) [86-2689, 86-2703]

5/5/87 Filed order (Sneed) Aple's mot of 4/16/87, is construed as a mot. to late file his answering brief. So construed, aple's mot is granted. The brief already rec'vd shall be filed. [86-2689 86-2703]

5/5/87 Filed original and 15 copies appellee Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's 39 pages brief, served on 4/14/87. [86-2689, 86-2703]

5/5/87 Filed original and 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689, John W. Waihee in 86-2703, Morris Takushi in 86-2703 reply brief, 25 pages, served on 5/1/87 [86-2689, 86-2703]

7/10/87 Calendared: San Francisco Aug 13, 1987 9:00

A.M. Courtroom 3 [86-2689, 86-2703]

8/4/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703 letter dated 8/3/87 re: additional citations. (Panel) [86-2689, 86-2703]

8/5/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/4/87 re: additional citations. (Panel) [86 - 2689, 86-2703]

8/10/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703 letter dated 8/7/87 re: copy of Hawaii statute submitted previously is less relevant to the issue. Panel [86-2689, 86-2703]

8/10/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/7/87 re: response to aple's letter dtd 8/7/87. Panel [86-2689, 86-2703]

8/13/87 Argued and Submitted TO: William A. Norris, John T. Noonan, Russell E. Smith. [86-2689, 86-2703]

3/18/88 Rec'd notice of substitution of counsel for aple, Alan Burdick. Mary Blaine Johnston, Johnston & Day, enters; Boyce Brown, Johnston & Day, withdraws. [86-2689, 86- 2703]

5/17/88 Filed Opinion (Norris, author, Noonan, Smith) Vacated and Remanded with Instructions to Abstain from Deciding Federal Constitutional Issue Pending a Determination by the State Courts of Question Whether Hawaii Election Laws Permit Write-In Voting. Filed and

Entered Judgment [86-2689, 86-2703]

6/10/88 Mandate Issued [86-2689, 86-2703]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

86-2703

10/10/86 Filed Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689 emergency motion to stay further action [86-2689], to consolidate case with case(s) 86-2703. [86-2689]; served on 10/9/86.

10/10/86 Docketed Cause and Entered Appearances of Counsel. [86-2703]

10/15/86 Filed order (Hug, Poole, Norris) Aplt's emergency mot. for a stay of the D.C.'s injunction pending appeal is granted. [86-2689, 86-2703] in 86-2703

10/23/86 Filed as of 10/22/86 appellant's Civil Appeals Docketing Statement served on 10/21/86. [86-2689, 86-2703]

10/24/86 Filed as of 10/22/86 certificate of record on appeal. RT filed in DC 10/10/86 [86-2689, 86 -2703]

10/27/86 Filed certificate of record on appeal. [86-2703]

1/21/87 Filed order (1) these appeals (86-2689 & 86-2703) are consolidated (2) aplts shall file a brief of not more than 50 pgs on or before 3/2/87 (3) aple shall file a brief of not more than 50 pgs on or before 4/6/87 (4) aplts may file a reply brief of not more than 25 pgs within 14 days of the service date of aple's brief. [86-2689, 86-2703]

3/12/87 Filed as of 3/11/87 original and 15 copies Appellants' opening brief, 50 pages, and 5 copies

excerpt of record, served on 3/9/87. [86-2689, 86-2703]

4/16/87 Received original and 15 copies Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's brief of 39 pages: Served on 4/14/87. (Motion to file late brief submitted simultaneously.) [86-2689, 86-2703]

4/21/87 Filed as of 4/16/87, Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703's motion to extend time to file appellee's brief until 4/16/87. [86-2689, 86 -2703]; served on 4/14/87

5/4/87 Received orig. 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689's brief of 25 pages. (Aple's brief not yet filed.) [86-2689 86-2703]

5/5/87 Filed order (SNEED) Aple's mot of 4/16/87, is construed as a mot. to late file his answering brief. So construed, aple's mot is granted. The brief already rec'vd shall be filed. [86-2689 86-2703]

5/5/87 Filed original and 15 copies appellee Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's 39 pages brief, served on 4/14/87. [86-2689, 86-2703]

5/5/87 Filed original and 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689, John W. Waihee in 86-2703, Morris Takushi in 86-2703 reply brief, 25 pages, served on 5/1/87 [86-2689, 86-2703]

7/10/87 Calendared: San Francisco Aug 13, 1987 9:00 A.M. Courtroom 3 [86-2689, 86-2703]

8/4/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703

letter dated 8/3/87 re: additional citations. (Panel) [86-2689, 86-2703]

8/5/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/4/87 re: additional citations. (Panel) [86 - 2689, 86-2703]

8/10/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703 letter dated 8/7/87 re: copy of Hawaii statute submitted previously is less relevant to the issue. Panel [86-2689, 86-2703]

8/10/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/7/87 re: response to aple's letter dtd 8/7/87. Panel [86-2689, 86-2703]

8/13/87 Argued and Submitted To: William A. Norris, John T. Noonan, Russell E. Smith. [86-2689, 86-2703]

3/18/88 Rec'd notice of substitution of counsel for aple, Alan Burdick. Mary Blaine Johnston, Johnston & Day, enters; Boyce Brown, Johnston & Day, withdraws. [86-2689, 86-2703]

5/17/88 Filed Opinion (Norris, author, Noonan, Smith) Vacated and Remanded with Instructions to Abstain from Deciding Federal Constitutional Issue Pending a Determination by the State Courts of Question Whether Hawaii Election Laws Permit Write-In Voting. Filed and Entered Judgment [86-2689, 86-2703]

6/10/88 Mandate Issued [86-2689, 86-2703]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90-15873

6/25/90 Docketed Cause and Entered Appearances of Counsel. [90-15873]

7/9/90 Filed Civil Appeals Docketing Statement served on 7/6/90 [90-15873]

7/23/90 Filed motion and deputy clerk order: Appellants' motion to consolidate appeal nos 90-15873, 90-15876, and 90-15877 is granted. Appellants' motion to expedite these consolidated appeals is granted (Motion recvd 7/18/90) [90-15873, 90-15876, 90- 15877]

7/23/90 Filed certificate of record on appeal RT filed in DC 6/14/90 [90-15873, 90-15876]

8/10/90 Filed original and 15 copies Appellants' opening brief (Informal: n) 50 pages and five excerpts of record in volumes; served on 8/8/90 [90-15873, 90-15876, 90-15877]

8/13/90 Received Amicus State of Washington, State of Arizona, State of California, State of Nevada's brief in 15 copies of 21 pages; deficient: late; served on 8/9/90 [90-15873, 90-15876, 90-15877]

8/13/90 Filed Amicus State of Washington et al's motion to file late the brief which was served on 8/9/90 [90-15873, 90-15876, 90-15877)

9/10/90 Received Appellants Morris Takushi & Benjamin Cayetano's addendum to supporting appellant's brief, served on 9/6/90 (Panel) [90-15873, 90-15876, 90-15877]

9/13/90 Filed original and 15 copies appellee Alan B.

Burdick's 34 pages brief; served on 9/5/90. [90-15873, 90-15876, 90-15877]

9/24/90 Filed original and 15 copies Morris Takushi in 90-15873, Benjamin Cayetano in 90-15873, Morris Takushi in 90-15876, Benjamin Cayetano in 90-15877 reply brief, (Informal: n) 25 pages; served on 9/21/90 Panel [90-15873, 90-15876, 90-15877]

10/16/90 Filed order granting amicus motion to file late brief [90-15873, 90-15876, 90-15877]

10/16/90 Filed original and 15 copies State of Washington, State of Arizona, State of California, State of Nevada's brief of 21 pages; served on 8/9/90 (Panel) [90-15873, 90-15876, 90-15877]

11/5/90 Filed (in Hawaii) pltf/aple's additional citations, served on 11/5/90. (Panel) [90- 15873, 90-15876, 90-15877]

11/5/90 Argued and Submitted To: Skopil, Beezer, Fernandez [90-15873, 90-15876, 90-15877]

3/1/91 Filed Opinion: Reversed (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]

3/18/91 Filed original and 40 copies Appellee Alan B. Burdick's petition for rehearing with suggestion for rehearing en banc 15 pages, served on 3/15/91 (Panel & All Active Judges) [90-15873, 90-15876, 90- 15877]

3/18/91 Received Amicus Libertarian Party's brief in 40 copies of 3 pages; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]

3/19/91 Filed Libertarian Party's motion to become

amicus curiae; served on 3/15/91 [1900939] (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Appellant Morris Takushi & Appellant Benjamin Cayetano response opposing motion to become amicus [1900939-1] served on 3/21/91 (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Alan B. Burdick's motion to extend time to file petition for rehearing en banc until 3/22/91, served on 3/21/91 [1904568] (petition has been filed & it was served on 3/15/91, but aple informed aplt that it was untimely) (Panel)

3/28/91 Filed order (Robert R. Beezer,): Appellants are directed to file a response to appellee's petition for rehearing with suggestion for rehearing en banc, filed on 3/18/91. Said response shall not exceed 15 pages and shall be filed on or before 4/26/91. [90-15873, 90-15876, 90-15877]

4/1/91 Filed Amicus Libertarian Party's reply to response to motion to become amicus [1900939 -1]; served on 3/28/91 (Panel) [90-15873, 90-15876, 90-15877]

4/2/91 Filed order (Otto R. Skopil, Robert R. Beezer, Ferdinand F. Fernandez): Upon due consideration, the motion for leave to file a brief of amicus curiae in support of the petition for rehearing and suggestion for rehearing en banc is granted. The Clerk is instructed to file the amicus curiae brief and circulate said brief to all active judges. 90-15873, 90-15876, 90-15877

4/2/91 Filed original and 40 copies Libertarian Party in 90-15873, Libertarian Party in 90-15876,

Libertarian Party in 90-15877's brief of 3 pages; served on 3/15/91 [90-15873, 90-15876, 90-15877] (Panel and All Active Judges)

4/15/91 Filed order (Robert R. Beezer): Aple's motion for an extension of time to file a petition for rehearing en banc from 14 days to 21 days is granted. [1904568-1] [90-15873, 90-15876, 90-15877]

4/29/91 Filed Appellant Morris Takushi & Benjamin Cayetano's response to petition for en banc rehearing served on 4/25/91. (Panel) [90-15873, 90-15876, 90-15877]

6/28/91 Filed Opinion: reopening case; denying petition for en banc rehearing in 90-15873, 90-15876, 90-15877 (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]

8/3/91 Mandate Issued [90-15873, 90-15876, 90-15877]

10/16/91 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 91-535 filed on 9/25/91. [90-15873, 90-15876, 90-15877]

12/13/91 Received notice from Supreme Court, petition for certiorari granted on 12/9/91 [90-15873 90-15876 90-15877]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90-15876

6/25/90 Docketed Cause and Entered Appearances of Counsel. Sent appellant(s) civil appeals docketing statement [90-15876]

7/9/90 Filed Steven S. Michaels for Appellant Morris Takushi's Civil Appeals Docketing Statement served on 7/6/90 [90-15876]

7/23/90 Filed motion and deputy clerk order: Appellants' motion to consolidate appeal nos 90-15873, 90-15876, and 90-15877 is granted. Appellants' motion to expedite these consolidated appeals is granted. (Motion recvd 7/18/90) [90-15873, 90-15876, 90-15877]

7/23/90 Filed certificate of record on appeal RT filed in DC 6/14/90 [90-15873, 90-15876]

8/10/90 Filed original and 15 copies Appellants' opening brief (Informal: n) 50 pages and five excerpts of record in volumes; served on 8/8/90 [90-15873, 90-15876, 90-15877]

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9/13/90 Filed original and 15 copies appellee Alan B. Burdick's 34 pages brief; served on 9/5/90. [90-15873, 90-15876, 90-15877]

9/24/90 Filed original and 15 copies Morris Takushi in 90-15873, Benjamin Cayetano in 90-15873, Morris Takushi in 90-15876, Benjamin Cayetano in 90-15877 reply brief, (Informal: n) 25 pages; served on 9/21/90 Panel [90-15873, 90-15876, 90-15877]

10/16/90 Filed order granting amicus motion to file late brief [90-15873, 90-15876, 90-15877]

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11/5/90 Filed (in Hawaii) pltf/aple's additional citations, served on 11/5/90. (Panel) [90-15873, 90-15876, 90-15877]

11/5/90 Argued and Submitted To: Skopil, Beezer, Fernandez [90-15873, 90-15876, 90-15877]

3/1/91 Filed Opinion: Reversed (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]

3/18/91 Filed original and 40 copies Appellee Alan B. Burdick's petition for rehearing with suggestion for rehearing en banc 15 pages, served on 3/15/91 (Panel & All Active Judges) [90-15873, 90-15876, 90-15877]

3/18/91 Received Amicus Libertarian Party's brief in

40 copies of 3 pages; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]

3/19/91 Filed Libertarian Party's motion to become amicus curiae; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Appellant Morris Takushi & Appellant Benjamin Cayetano response opposing motion to become amicus served on 3/21/91 (Panel) [90-15873, 90-15876, 90-15877]

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3/28/91 Filed order (Robert R. Beezer,): Appellants are directed to file a response to appellee's petition for rehearing with suggestion for rehearing en banc, filed on 3/18/91. Said response shall not exceed 15 pages and shall be filed on or before 4/26/91. [90-15873, 90-15876, 90-15877]

4/1/91 Filed Amicus Libertarian Party's reply to response to motion to become amicus [1900939 -1]; served on 3/28/91 (Panel) [90-15873, 90-15876, 90-15877]

4/2/91 Filed order (Otto R. Skopil, Robert R. Beezer, Ferdinand F. Fernandez): Upon due consideration, the motion for leave to file a brief of amicus curiae in support of the petition for rehearing and suggestion for rehearing en banc is granted. The Clerk is instructed to file the amicus curiae brief and circulate said brief to all active judges. 90-15873, 90-15876, 90-15877

4/2/91 Filed original and 40 copies Libertarian Party in 90-15873, Libertarian Party in 90-15876, Libertarian Party in 90-15877's brief of 3 pages; served on 3/15/91 [90-15873, 90-15876, 90-15877] (Panel and All Active Judges)

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8/3/91 Mandate Issued [90-15873, 90-15876, 90-15877]

10/16/91 Received notice from Supreme Court: petition for certiorari filed Supreme Court No 91-535 filed on 9/25/91. [90-15873, 90-15876, 90-15877]

12/13/91 Received notice from Supreme Court, petition for certiorari granted on 12/5/91 [90-15873 90-15876 90-15877]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90-15877

6/25/90 Docketed Cause and Entered Appearances of Counsel. Sent appellant(s) civil appeals docketing statement setting schedule [90-15877]

7/9/90 Filed Steven S. Michaels for Appellant Benjamin Cayetano's Civil Appeals Docketing Statement served on 7/6/90 [90-15877]

7/23/90 Filed motion and deputy clerk order: Appellants' motion to consolidate appeal nos 90-15873, 90-15876, and 90-15877 is granted. Appellants' motion to expedite these consolidated appeals is granted. (Motion rec'vd 7/18/90) [90-15873, 90-15876, 90-15877]

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12/13/91 Received notice from Supreme Court, petition for certiorari granted on 12/9/91 [90-15873 90-15876 90-15877]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]

ALAN B. BURDICK,	)	Civil No. 86 0582
Plaintiff,	)	
vs.	)	
MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii;	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Alan B. Burdick, through his attorneys Brown & Johnston alleges as follows:

I.

Preliminary Statement

1. This action alleges that administrative rules of Hawaii State Government prohibiting voters from writing-in on election ballots the names of individuals for whom they wish to vote, but whose names are not printed on the ballots, is a violation of both the Federal and State Constitutions and a denial of their civil rights.

2. Plaintiff Alan B. Burdick is a resident of the City and County of Honolulu and is a registered voter in the City and County of Honolulu, State of Hawaii.

3. Defendant Morris Takushi is a resident of the

City and County of Honolulu, State of Hawaii and is Director of Elections for the State of Hawaii. He is sued in his capacity as Director of Elections.

4. Defendant John Waihee is a resident of the City, and County of Honolulu, State of Hawaii. He is the Lieutenant Governor of the State of Hawaii and the Chief Elections Officer pursuant to Hawaii Revised Statutes ("HRS") Section 11-2 and is responsible for the conduct of the elections for State and Federal offices. He is sued in his capacity as Lieutenant Governor.

5. The statute governing elections, HRS Chapter 11, makes no express provision for voters to writs in the name of a candidate or in any other way to vote for a candidate whose name is not printed on the ballot.

6. HRS Chapter 11 makes no express provision for the counting of votes for persons whose names have been written-in on a ballot, or for publishing the results of any write-in votes.

7. Plaintiff Alan B. Burdick resides in a State House Representative District where, as of July 23, 1986 (the deadline for candidates to file nominating papers) only one candidate filed to run for election to the State House of Representatives. Defendants have declared that the sole candidate who has filed for election in that State House of Representatives district has been automatically "elected". Thus, Plaintiff Burdick has no choice of candidate for that race. As to that race, Plaintiff Alan Burdick wants to vote, in both the primary and general elections, for a person who has not filed nominating papers and whose name will not be printed on the ballots for either the primary or general elections.

8. In addition thereto, Plaintiff wishes to vote for other persons in other elections, in both the primary and general elections in both State and Federal elections, in 1986 and in the future, whose names are not, or may not

be on the election ballot.

9. Plaintiff made inquiries both by phone call and by letter to the Defendant Lieutenant Governor Waihee to determine whether he would be permitted to write-in the name of candidates on the ballot. Plaintiff was informed by Mr. Morris Takushi, Director of Elections, that because the HRS Chapter 11 makes no explicit provision for a write-in vote that write-in voting is prohibited.

10. In response to Plaintiff Burdick's written inquiry, the Attorney General's Office issued an opinion letter asserting that neither the legislature nor the Lieutenant Governor were required to permit write-in votes. (See Exhibit 1 attached hereto).

11. Thus, Plaintiff Burdick will be unable to vote for or have a write-in vote for the candidate of his choice counted in the upcoming elections.

12. The denial of Plaintiff's right to vote for the person of his choice constitutes violations of the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States of America as well as violations of Article I, Sections 2, 4, 6 and 20, and Article II, Section 4, of the Constitution of the State of Hawaii.

13. The denial of Plaintiff's constitutional rights constitutes a violation of 42 USC 1983.

14. Defendants' refusal to permit the casting and counting of write-in votes is unauthorized by statute and constitutes conduct ultra vires of their authority under the Constitution and laws of the United States of America and the State of Hawaii.

15. Defendants' refusal to permit the casting and counting of write-in votes constitutes an abuse of their discretionary authority.

16. This court has jurisdiction of this action pursuant

to 28 USC 1343(3)(4) and 42 USC 1983.

II.

Jurisdiction

17. Plaintiff seeks declaratory and injunctive relief pursuant to 28 USC Sections 2201 and 2202.

III.

Claims for Relief

Wherefore, Plaintiff prays for relief as follows:

1. That this Court declare that a prohibition on write-in votes on election ballots is unconstitutional;

2. That this Court require Defendants to

   a) Provide a space on the ballots for write-in votes

   b) Count write-in votes

   c) Publish the results of write-in votes

   d) Instruct election workers to advise voters that they can writs-in votes and inform the voters that write-in voting is permitted.

3. That this Court award Plaintiff costs of suit and attorneys' fees pursuant to 42 USC 1988.

4. That this Court grant Plaintiff such other and further relief as this Court deems just.

DATED: Honolulu, Hawaii, August 21, 1986

s/s
MARY BLAINE JOHNSTON
Attorney for Plaintiff
Alan B. Burdick
ACLU of Hawaii Foundation

[Letterhead -- Office of the Lieutenant Governor]

July 11, 1986

Mr. Alan B. Burdick
144 Kapaa Street
Kailua, Hawaii 96734

Re: Write-In Votes Inquiry

Dear Mr. Burdick:

As we earlier discussed, I am herewith forwarding to you a copy of the Letter Opinion of the Attorney General's office relative to above referenced matter.

Please do not hesitate to call me should you have any further questions regarding this matter.

Very truly yours,

/s/

GERARD JERVIS, Director
Special Projects and Constituent Relations

Enclosure

Exhibit 1

[Letterhead -- Department of the Attorney General]

July 11, 1986

Mr. Gerard Jervis
Director of Research
Office of the Lieutenant Governor
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Jervis:

Re: Inquiry of Alan Burdick Regarding Prohibition Against Write-In Votes

This responds to your request for our review of the issues raised in the material prepared by Alan Burdick which I received on June 26, 1986.

Essentially, Mr. Burdick asserts that the federal constitution mandates that Hawaii's election laws include provisions for write-in voting. He cites two cases, a 1985 opinion by the California Supreme Court and a 1967 Georgia Supreme Court decision, to support his contention. Although the more recent decision from California refers to Untied States Supreme Court decisions which address parties' candidates', and voters' rights, none of the federal cases seems to require the conclusion which Mr. Burdick urges, and the California and Georgia opinions themselves are of no precedential effect in Hawaii. We are, therefore, not persuaded that the Legislature, or the Lieutenant Governor, as the State's chief election officer, must enact laws or adopt rules which would allow write-in voting.

Very truly yours,
/s/
Charleen M. Aina
Deputy Attorney General

CMA:ai
3689I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

MOTION FOR SUMMARY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Plaintiff Alan B. Burdick, through his attorney Mary Blaine Johnston, moves this court pursuant to Rules 56, 57 and 65(a) of the Federal Rules of Civil Procedure, for Summary Judgment in his favor on the Complaint and for a Preliminary and Permanent Injunction as set forth in the proposed order attached hereto.

The Motion is based on the Memorandum of Law and Exhibits attached hereto and the pleadings and files herein.

DATED: Honolulu, Hawaii, September 10, 1986.

/s/
MARY BLAINE JOHNSTON
Attorney for Plaintiff
American Civil Liberties
Union of Hawaii Foundation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

AFFIDAVIT OF ALAN B. BURDICK

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU) SS

Alan B. Burdick being first duly sworn on oath deposes and says that:

1. I am the Plaintiff and attorney pro se in this case.

2. At the end of May, 1986, I began an inquiry as to whether or not voters in the 1986 election would be able to write in the names of candidates.

3. I contacted Defendant Morris Takushi, the Director of Elections, who told me that he interpreted the lack of an express statutory authorization to allow write- in votes as a prohibition on write-in voting.

4. At the suggestion of Mr. Takushi, I next spoke with Gerard Jervis, Director of Research in the Lieutenant Governor's office, and asked him if the Lieutenant Governor's Office would change its policy against write-in voting. Mr. Jervis asked me to make my request by letter.

5. On June 6, 1986, I wrote to Mr. Jervis repeating my request and transmitted copies of two court cases that I believed would persuade the Lieutenant Governor's Office of the legal impropriety of its position. (A true and correct copy of my letter to Mr. Jervis, without enclosures, is attached hereto as Exhibit 1).

6. On June 24, 1986, Mr. Jervis wrote me stating that the question had been referred to the Attorney General's office. (A true and correct copy of this letter

is attached hereto as Exhibit 2).

7. On July 11, 1986, I received a response from Mr. Jervis. He which included a letter that he had received from the Attorney General's office in which a deputy attorney general stated there was no reason to change the policy. (A true and correct copy of the July 11 letter and its enclosure is attached hereto as Exhibit 3).

8. In the meantime, I had asked the ACLU if it would help me in challenging the State's policy on write-in voting.

9. As of July 23, 1986, the deadline for filing to run in the primary election, only one person had qualified to run as a candidate for the Hawaii State house of Representatives seat in my district. I do not want to vote for this candidate and I wish to write in another person's name.

10. I expect that in other electoral contests in November, 1986, and thereafter, I will not wish to vote for any of the candidates listed on the ballot, even though there is more than one candidate for a particular office. In such elections, as well as in "uncontested" elections, I regard it as essential to my rights as a voter and citizen to be able to write in the name of persons other than the listed candidates.

11. Unless this Court grants the relief I have requested, i.e., that the State be required to provide a space for write-in votes, and publish the results, I will be irreparably harmed because I will not be able to vote for the candidate of my choice.

Further affiant sayeth naught.

s/s
ALAN B. BURDICK

[September 9, 1986]
[Subscription Omitted in Printing]

June 6, 1986

Gerard Jervis, Esq.
Director of Research
Office of the Lieutenant Governor
Fifth Floor
State Capitol
Honolulu, Hawaii 96813

Re: The Right to Cast Write-In Votes

Dear Mr. Jervis:

During the past week, I have made several inquiries concerning the right of people to cast write-in votes. (Although I am an attorney, I am not representing anyone else on this matter at this time.) My initial inquiry to the Voter Education desk led me to Mr. Morris Takushi, the Director of Elections, who referred me to you.

In our telephone conversation on June 2, 1986, I advised you that I am asking the Office of the Lieutenant Governor to change its policy against write-in voting. You asked me to provide you a letter outlining my concerns and proposals. I write this letter in response to your request.

The Current Situation.

Elections in Hawaii are governed by state law. See generally H.R.S. Chapter 11. (These statutory provisions are, of course, subject to the safeguards of the United States and Hawaii constitutions.) The state election statutes neither expressly recognize the right of a voter to

cast write-in votes, nor do the statutes purport to deny that right.

In my telephone conference with Mr. Morris Takushi, the Director of Elections, on May 29, 1986, he told me that he interpreted the lack of an express statutory authorization to allow write-in votes as prohibiting him from allowing them. Thus, as a direct result of statutory silence and administrative decision, we have the following situation in Hawaii:

1. No space is provided on the ballots for write-in votes.

2. Write-in votes, if they somehow are squeezed in on the ballot, are not counted.

3. Since write-in votes are not counted, the fact of write-in votes being cast and the number and distribution of write-in votes actually cast are not published in the official tally of the election.

4. Election workers are evidently instructed to advise voters that they may not cast write-in votes.

The Law in the United States.

I believe that this policy infringes my rights under the First, Fifth, Ninth, Fourteenth, and Fifteenth Amendments of the United States Constitution, and the provisions of Article I, sections 1, 2, 4, 5, and 8 and Article II, section 4 of the Constitution of the State of Hawaii.

Courts throughout the United States have been nearly unanimous in holding that a blanket prohibition of write-in voting, such as exists in Hawaii, is unconstitutional. In a comprehensive and scholarly opinion, the California Supreme Court has recently struck down a municipal law prohibiting write-in votes. *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985). A copy of the decision is enclosed for your convenience of reference. In *Canaan*, the court found

that

> the right of candidates to "seek the public's suffrage" and the right of . . . voters to cast ballots for the candidates of their choice . . . are of sufficient magnitude to warrant the protection of the First and Fourteenth Amendments (to the United States Constitution] and the comparable provisions of our State Constitution . . . .

Canaan, *supra*, 221 Cal. Rptr. at 475.

The court then went on to hold that:

> San Diego's prohibition on write-in voting at the general election prevents voters from exercising "the free and pure expression of (their) choice of candidates" (*Gould v. Grubb*, *supra*, 14 Cal.3d at p. 677, 122 Cal. Rptr. 377, 536 P.2d 1337), thereby "effectively silencing a form of political dissent essential to our democratic process." (Constitutionality of Filing Deadlines, *supra*, at p. 722). "To restrict a voter to only those candidates whose names appear on the ballot arguably denies him any affirmative method of expressing his dissatisfaction with the listed candidates. He faces one choice: he must either select from a group of candidates, all of whom he deems unworthy, or not vote at all." (Batey, "Electoral Graffiti: The Right to Write-in" (1981) 5 Nova L.J. 201, 203.)

Id. at 476.

Political expression has, of course, always been recognized by the courts as entitled to the greatest protection of any form of constitutionally protected expression.

Thus, it is absolutely irrelevant whether or not a

given write-in candidate has a practical chance of election in a given election. In *Canaan*, the California Supreme Court recognized that lack of predictable electoral success is no barrier to the right of a voter to write-in the name of the candidate of his choice:

> There will always be voters whose views, interests or priorities are not in any way represented by the candidates appearing on the ballot. While candidates who do represent these voters' views may have little chance of success, it is important in a free society that political diversity be given expression.

Id. *Accord*, *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 987 (S.D. Ohio 1968): "The use of write-in ballots does not and should not [depend] on the candidate's chance of success."

Obviously, the right to cast a write-in vote is worthless if it won't be counted and published. The court so held in *Cannan*, stating:

> A right to "express [one's] feelings" without legal effect, however, is antithetical to the fundamental nature of the right to vote. The First Amendment guarantees the right to *public* political expression. If the expression is so effectively muffled that no one can hear it, this guarantee is a hollow one. As this court has said in a slightly different context, "'[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or [the] right to pull a lever in a voting booth . . . . It also includes the right to have the vote counted at full value without dilution or discount.'" . . . .

Canann, *supra*, at 476-77 (emphasis in original; citation omitted).

Similarly, the Georgia Supreme Court stated in *Thompson v. Willson*, 223 Ga. 370, 155 S.E. 2d 401, 404 (1967), "A refusal to count [a write-in voter's] vote completely ignores it and is tantamount to a refusal to allow him to cast it." The Georgia Supreme Court then commented further on the practice of refusing to count write-in ballots:

> We have heard of similar methods of holding elections in other so-called democratic countries which lay claim to being more completely democratic, but this is not the American way of holding elections, and our Constitutions protect us in guaranteeing our citizens these rights which have been fundamental in our various States since the dawn of this Nation. The Fifteenth Amendment of our Federal Constitution further enlarged on this right of citizens.

Id.

California in 1985 and Georgia in 1967 are by no means alone in finding that bans on write-in voting are unconstitutional. The California Supreme Court's decision in *Canaan* lists similar decisions in twenty-two different states. 221 Cal. Rptr. at 482 n.22. These decisions go back as far as the 1890's and range across the entire country.

Just as a sample, look at the courts that have held that write-in voting must be allowed where the statutes don't expressly permit write-in voting -- just as in Hawaii today. These courts include Indiana, 1967; Oregon, 1945; Iowa, 1915; Mississippi, 1912; Utah, 1911; Nevada, 1910; Minnesota, 1909; Illinois, 1895; and Missouri, 1892.

The Proposed Solution.

By this letter, I request that the Office of the Lieutenant Governor, for every future election commencing

with the September 1986 primary:

1. Provide adequate spaces on the ballots for write-in votes clearly marked as being for such votes. Where a single candidate is to be elected to a given office, one line obviously suffices. Where multiple candidates are chosen (as for example in the election for the State Board of Education), the lines for write-in candidates must equal the number of positions to be filled.

2. Count all write-in votes.

3. Publish, in all reports of election results, the names of each write-in candidate who has received votes and the number of votes he or she has received.

4. Inform the public, in conspicuous language in all voter-information materials, that they have the right to cast write-in votes, and that their write-in votes will be counted and published, just like all other votes.

The first three items are required, in my view, by the case law I have mentioned and the cases cited in the *Canaan* decision. I believe that the fourth item is necessary to correct the misunderstandings that must exist among the public. First of all, most voters, having never seen any space for write-ins on the ballot or any voter information telling them that they can cast write-in votes, naturally assume that they can't cast write-in votes. Second, if my situation is typical, those voters who have asked about write-in voting were told that they can't. Finally, everyone who reads the election results never sees any listings of write-in votes -- because write-in votes, if made, are never counted -- and they could naturally assume that there is no point in casting a write-in vote. The Office of the Lieutenant Governor must correct the misimpression that it has created among the

public.

During our telephone conference on June 2, you mentioned that you might refer this matter to the Attorney General for her official opinion. I urge you to do so if, for any reason, your office does not find this letter sufficiently persuasive to change the current policy without such a referral.

The primary election is on September 20, just three months away. A new policy, as outlined on the previous pages, must be in effect well enough before that time so that people will be fully aware of their rights.

Accordingly, I ask that you provide me, by June 25, 1986, a formal assurance by letter stating that the new policy will take effect by July 1, 1986 -- in ample time before the primary election, and that it will remain in effect for all future elections.

I will, of course, be pleased to discuss this matter further with you or any other representative of the State Government. Thank you very much for your consideration of this matter of our fundamental constitutional rights.

Sincerely yours,

/s/

Alan B. Burdick
144 Kapaa Street
Kailua, Hawaii 96734
(Tel. 547-5600)

ABB: tls
Enclosures: *Canaan* decision
Thompson decision

[Letterhead -- Office of the Lieutenant Governor]

June 24, 1986

Alan B. Burdick, J.D.
144 Kapaa Street
Kailua, Hawaii 96734

Dear Mr. Burdick:

Thank you for your letter of June 6, 1986 outlining your concerns and proposals over the right to cast write-in votes in Hawaii elections.

Recognizing the seriousness of your question, we have asked the Attorney General to review your request and the points you make. As soon as we hear from them, I will notify you.

Very truly yours,

/s/

GERARD JERVIS
Director of Research

Exhibit 2

[Letterhead -- Office of the Lieutenant Governor]

July 11, 1986

Alan B. Burdick, J.D.
144 Kapaa Street
Kailua, Hawaii 96734

Re: Write-In Votes Inquiry

Dear Mr. Burdick:

As we earlier discussed, I am herewith forwarding to you a copy of the Letter Opinion of the Attorney General's office relative to above referenced matter.

Please do not hesitate to call me should you have any further questions regarding this matter.

Very truly yours,

/s/

GERARD JERVIS, Director
Special Projects and
Constituent Relations

Enclosure

Exhibit 3

[Letterhead -- Department of the Attorney General]

July 11, 1986

Mr. Gerard Jervis
Director of Research
Office of the Lieutenant Governor
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Jervis:

Re: Inquiry of Alan Burdick Regarding Prohibition Against Write-In Votes

This responds to your request for our review of the issues raised in the material prepared by Alan Burdick which I received on June 26, 1986.

Essentially, Mr. Burdick asserts that the federal constitution mandates that Hawaii's election laws include provisions for write-in voting. He cites two cases, a 1985 opinion by the California Supreme Court and a 1967 Georgia Supreme Court decision, to support his contention. Although the more recent decision from California refers to United states Supreme Court decisions which address parties', candidates', and voters' rights, none of the federal cases seems to require the conclusion which Mr. Burdick urges, and the California and Georgia opinions themselves are of no precedential effect in Hawaii. We are, therefore, not persuaded that the Legislature, or the Lieutenant Governor, as the State's chief election officer, must enact laws or adopt rules which would allow write-in voting.

Very truly yours,
/s/
Charleen M. Aina
Deputy Attorney General

CMA:ai

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]

ALAN B. BURDICK,	)	Civil No. 86 0582
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii;	)	
	)	
Defendants.	)	

[PROPOSED] ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

The Motion of Plaintiff Alan B. Burdick for Summary Judgment and for Preliminary and Permanent Injunctive Relief was heard by this court on _____.

The Court finds that there are no facts in dispute. Hawaii's election law neither expressly provides for nor expressly prohibits write-in balloting. However, State election officials, Defendants Morris Takushi and Lieutenant Governor John Waihee, have interpreted the law as neither allowing nor requiring means to be made for the casting and tabulating of write-in ballots.

The court finds that Defendants' failure and refusal

to provide for write-in balloting is, as a matter of law, a violation of Plaintiff's state and federal constitutional right to vote freely for the candidate of his choice. The Court finds also that this failure to provide for write-in balloting is an infringement on the First and Fourteenth Amendments rights guaranteed by the Constitution of the State of Hawaii and of the United States of America. Further, such constitutional infringement on Plaintiff's voting rights is a violation of Plaintiff's civil rights pursuant to 42 U.S.C. 1983.

Further, the Court holds that the rights of Plaintiff and other voters infringed on by Defendants' present policies regarding write-in balloting is of serious enough magnitude to warrant the issuance of an Order Granting Preliminary and Permanent Injunctive Relief.

The Court therefore orders as follows:

1. Summary Judgment in favor of Plaintiff is entered and Judgment is entered herein declaring that Defendants' present policies of not providing space on the election ballots for write-in of candidates' names, not counting write-in votes, and not publishing the results of write-in voting are unconstitutional.

2. Defendants Takushi and Waihee are hereby enjoined from refusing to provide for write-in balloting. Further, they are ordered that by the general election to be held on November 4, 1986, they are to:

> 1. Provide adequate spaces on the ballots for write-in votes clearly marked as being for such votes. Where a single candidate is to be elected to a given office, one line obviously suffices. Where multiple candidates are chosen (as for example in the election for the State Board of Education), the lines for write-in candidates must equal the number of positions to be filled.
>
> 2. Count all write-in votes and give these votes

all the same legal effect as other votes.

3. Publish, in all reports of election results, the names of each write-in candidate who has received votes and the number of votes he or she has received.

4. Inform the public, in conspicuous language in all voter-information materials, that they have the right to cast write-in votes, and that their write-in votes will be counted and published, just like all other votes.

5. Instruct all election officials and workers to advise voters that they may cast write-in votes and that such write-in votes will be counted, published and shall have the same legal affect as all other votes.

3. Plaintiff will be awarded attorney's fees and costs pursuant to 42 U.S.C. 1988 upon approval of his application for fees and costs by this Court.

DATED: Honolulu, Hawaii,

_____

Judge of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Come now Defendants Morris Takushi, in his official capacity as the Director of Elections of the State of Hawaii, and John Waihee, in his official capacity as the Lieutenant Governor of the State of Hawaii, by their attorneys, Corinne K. A. Watanabe, Attorney General of the State of Hawaii, and Lawrence L. Hines, Deputy Attorney General, and answer Plaintiff's Complaint as follows:

FIRST DEFENSE:

1. Plaintiff's Complaint fails to state a claim against Defendants noon which relief can be granted.

SECOND DEFENSE:

2. This Court lacks subject matter jurisdiction over this action.

THIRD DEFENSE:

3. Suit against Defendants is barred by the doctrine of laches.

FOURTH DEFENSE:

4. Suit against Defendants is barred by the doctrine of qualified immunity.

FIFTH DEFENSE:

5. Defendants admit the allegations contained in paragraphs 3, 4, 6, 9 and 10 of Plaintiff's Complaint.

6. Defendants deny the allegations contained in

paragraphs 1, 12, 14, 15, and 16 of Plaintiff's Complaint.

7. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 8 of Plaintiff's Complaint.

8. Defendants admit Plaintiff is a resident of the City and county of Honolulu and is presently registered to vote in the 19th State Representative District.

9. Defendants admit the allegations contained in paragraph 5 of the Plaintiff's Complaint but aver that Chapter 11, Hawaii Revised Statutes, is not the only Hawaii statute governing elections.

10. Defendants admit that Plaintiff is presently registered to vote in the 19th State Representative District and that only one candidate has filed to run for election in that State Representative District. Defendants deny that they have declared the sole candidate has been automatically elected, and are without sufficient knowledge or information to form a belief as to the truth of any and all other allegations contained in paragraph 7.

11. In response to paragraph 11, Defendants admit Plaintiff will not be allowed to write-in vote but are without sufficient information or knowledge to form a belief as to any and all other allegations contained therein.

12. Defendants admit the allegations contained in Paragraph 13 are generally true, however, Defendants deny that Plaintiff's constitutional rights have been violated.

13. Paragraph 17 of Plaintiff's Complaint does not require a responsive pleading.

14. Defendants deny each and every allegation in Plaintiff's Complaint not hereinabove specifically answered.

WHEREFORE, Defendants pray that this action be

dismissed ard that Defendants be awarded their costs herein, including reasonable attorneys' fees, and such other relief as shall be deemed appropriate.

DATED: Honolulu, Hawaii, September 15, 1986.

CORINNE K. A. WATANABE
Attorney General

By s/s
LAWRENCE L. HINES
Deputy Attorney General

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF DWAYNE D. YOSHINA

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

DWAYNE D. YOSHINA, being first duly sworn, on oath, deposes and says:

1. He is currently the Deputy Director/Election Systems Planner in the Office of the Lieutenant Governor, State of Hawaii. In that capacity he is responsible for the statewide operation of elections, election systems and services, and planning of election systems.

2. The state exclusively uses the electronic punch card voting system and such system has been in use for the past 12 to 14 years.

3. September 5, 1986, is the deadline for the filing of candidacy petitions, constitutional amendments and county charter amendments for the November general election.

4. The ballot codes, ballot types, contests, fonts, type style and ballot position of candidates for the November general election must be assigned by September 9, 1986.

5. On September 16, 1986, the order for the printing of the ballots for the general election was placed with the printer (without the names of the candidates) providing the count of the regular, absentee, reserve, duplicate and test ballots required for each district and precinct. At the same time the separate ballots were ordered with candidates' names for the special general election of OHA and Board of Education including the separate ballots for constitutional and charter amendments.

6. On September 22, 1986, the ballot work sheets containing the candidates names and contests must be completed and sent to the printer.

7. On September 26, 1986, the absentee ballots for the general election are delivered by the printer and distributed to the county clerks on September 30, 1986. This is necessary to comply with the recommendation of the Federal Assistance Program that absentee ballots to overseas absentee voters be mailed at least 35 days before the election.

8. On October 17, 1986, all ballots for the polls arrive from the printer.

9. From October 17 to October 31, 1986, the ballots are inspected, inventoried, packed in ballot transport containers for each district and precinct and sealed.

10. From October 31 to November 3, 1986, the ballots are distributed to the Neighbor Islands.

11. On November 4, 1986, the ballots are delivered to all districts and precincts.

12. The State's entire election system is designed to accommodate the candidate nomination process and allow all qualified candidates to run.

13. Approximately three million ballot cards will be required and printed for use in the general election.

14. At present the ballot counting system is not designed to count write-in votes mechanically and write-in voting would necessitate the counting of three million ballots by hand in the upcoming general election.

15. Write-in voting would require the designing of an entirely new system for the processing and counting of ballot cards which would include both a mechanical and manual review of ballots.

16. The design of a new mechanical processing and counting system of write-in votes would require considerable time and would be at great cost to the State.

17. The present mechanical system of counting ballots eliminates errors and write-in votes would require the manual handling of ballot errors resulting in increased possibility of human error.

18. The integrity and security of the present system would be disrupted.

19. The necessity of counting write-in votes manually would require additional manpower and staffing of employees.

20. The cost of additional manpower and staffing of employees to manually count write-in votes would be from five thousand (5,000) to ten thousand (10,000) dollars for each election, primary and general.

21. The manual counting of write-in votes would result in considerable delay of time, perhaps days, in determining election results.

Further Affiant sayeth naught.

/s/
DWAYNE J. YOSHINA

[September 19, 1986]
[Subscription Omitted in Printing]
[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT

District of Hawaii

ALAN B. BURDICK,

v

MORRIS TAKUSHI, Director
of Elections, et al.

Case Number 86-0582

JUDGMENT IN A CIVIL CASE

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** The action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Summary Judgment is entered in favor of Plaintiff and against Defendants. IT IS FURTHER ORDERED that the Motion for a Permanent Injunction is GRANTED.

cc: all counsel

September 30, 1986
Date

/s/
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (all defendants in the above-titled action), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Motion for Summary Judgment And for Permanent Injunction" entered in this action on the twenty-ninth day of September, 1986, and from the "Judgment in a Civil Case" entered in this action on the thirtieth day of September, 1986.

DATED: Honolulu, Hawaii, September 30, 1986.

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

/s/
CHARLEEN M. AINA
LAWRENCE L. HINES
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

MOTION FOR STAY, SUSPENSION
OR MODIFICATION OF INJUNCTION

Defendants, by and through their attorneys, Corinne K. A. Watanabe, Attorney General, State of Hawaii, and her undersigned deputy, move this Court, pursuant to Rule 62(c), Federal Rules of Civil Procedure, for an order staying, in toto or with respect to the general election to be held November 4, 1986, the Court's injunction and judgment requiring Hawaii to allow write-in votes to be cast, counted, and considered.

Defendants' motion is brought for the reasons set forth in the memorandum in support of this motion, the affidavits and exhibits attached hereto, and the pleadings and files herein.

DATED: Honolulu, Hawaii, October 3, 1986.

CORINNE K. A. WATANABE
Attorney General

By s/s
Steven S. Michaels
Deputy Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF DWAYNE D. YOSHINA

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

DWAYNE D. YOSHINA, being first duly sworn, on oath, deposes and says:

1. He is currently the Deputy Director/Elections Systems Planner in the Office of the Lieutenant Governor, State of Hawaii. In that capacity, he is responsible for the preparation, printing, testing, distribution and tabulation of all ballots used in Hawaii's 1986 general election. Further, in light of the Court's Order Granting Motion For Summary Judgment and For Permanent Injunction filed September 29, 1986, he has been designated to head the technical task force formed by the Lieutenant Governor to implement the Court-required write-in vote casting, counting and reporting in the 1986 general election.

2. Hawaii's 1986 general election ballot consists of up to seven cards (for voters in the City and County of Honolulu) on which the names of all candidates nominated in the preceding primary election, the names of candidates for the Board of Education and trustees of the Office of Hawaiian Affairs, and questions concerning proposed state constitutional amendments, proposed county charter amendments, or proposed initiative or referendum issues, are printed. *See* Exhibit "A". There are eighty-one different syles of ballot card "A" on which names of candidates nominated in the primary election are printed.

3. By contract effective July 2, 1986, Sequoia-Pacific Systems Corp. (hereinafter "Sequoia"), of Exeter, California, is required to print, prepunch, stitch-bundle, pack and ship the approximately 3 million cards which represent all of Hawaii's 4000,000 1986 general election regular, absentee, reserve, duplicate, and test ballots (note that a ballot consists of a group of ballot cards). All processing of Hawaii's absentee ballots was completed by Sequoia on September 29, 1986, (absentee ballots differ in form from regular ballots with respect to the column in which the vote is manually marked; Exhibit "B" are two examples of an absentee ballot that will be used in the 1986 general election), and all regular ballots were printed by September 30, 1986. The cards for the regular ballots must still be prepunched, as allowed by section 11-112(d), Hawaii Revised Statutes, stitched together in the appropriate voting sets for each district/precinct, and packed, before they can be shipped to Hawaii and distributed.

4. To implement Court-ordered write-in voting, the absentee and regular ballot cards normally used in Hawaii's electronic punch-card system to elect persons to fill state and county offices, i.e., ballot card types "A," "B" and "OHA," would have to be reformatted and reprinted. In addition, a second ballot card type "A" would probably have to be printed to accommodate the reformatting and provide sufficient space for write-in voting in the multimember county council races in Maui and Kauai counties.

5. Sequoia has informed Affiant that it cannot reprint the approximately 1 million candidate ballot cards that would need to be reformatted, within the four weeks that remain before the general election. Sequoia is obliged to complete ballot printing for other jurisdictions with whom it has contracted.

6. Because the ballot cards for offices cannot be reprinted in time to include instructions for write-in

voting and provide sufficient space in which names may be written for each office, it is impossible to use the State's computer punch card system to cast, tabulate, or record write-in votes.

7. To implement the Court's order at all, write-in votes will have to be cast using the already-printed ballot cards and write-in ballot envelopes left over from previous elections in California. *See* Exhibit "C."

8. Because of the limited time remaining before the general election, Hawaii will not be able to purchase write-in ballot envelopes specifically made and printed for Hawaii's election. Sequoia has already indicated that because of its full printing schedule, it is not able to print such envelopes even though blank envelopes might be ordered from the manufacturer in a timely manner. Two other printing companies, Computer Elections Systems Services and St. Regis Paper, cannot guarantee delivery of envelopes with any instructions in the time remaining. The most reliable source for the requisite number of write-in envelopes is Santa Clara County of California which is willing to sell Hawaii 500,000 of its surplus envelopes for $5.00 per thousand. However, the instructions for using the envelope are printed in English, or English and Spanish, in an undetermined proportion. Other possible sources of envelopes are Los Angeles County and King County in Washington State. The envelope style and number available in each jurisdiction are as yet unknown.

9. Because the envelopes to be used for write-in voting were not manufactured specifically for Hawaii, the requisite Japanese translation of the envelope's instructions will have to be prepared on a separate sheet of paper for inclusion in all ballots, including absentees, distributed by the Counties of Hawaii, Kauai and Maui, to satisfy the requirements of the Voting Rights Act Amendments of 1982. *See* Exhibit "D." Absentee ballots cannot be mailed until these translations are made,

verified and prepared. (Instructions for voters using regular ballots on election day for write-in voting will be posted at each polling place. In the three Neighbor Island counties, these instructions will have to be translated into Japanese, verified and printed before they can be used.) Efforts are currently underway to draft relevant instructions, but because all instructions must be coordinated with the Department of the Attorney General in light of the injunction, this drafting is still ongoing as of this writing.

10. It is currently intended, to ease somewhat the administrative burden imposed by the Court's order, to allow absentee voters who wish ballots immediately to acknowledge in writing that at their request, a write-in ballot envelope was not provided with their absentee ballots. If requests for absentee ballots are not accompanied by the written acknowledgment (or waiver), a write-in ballot envelope (with the separate instruction sheet) will be included with the absentee ballot which is sent to the voter.

11. It is currently intended that a voter wishing to cast a write-in vote for one or more offices on election day may request and will be given a write-in ballot envelope along with the appropriate ballot cards for the precinct in which the votes are being cast. Pens will be available in each voting booth to allow the voter to hand write the name and title of the office for which a write-in vote is cast on the lines printed in the inside of the write-in ballot envelope. If the voter wishes to vote for an individual nominated in the primary, the voter can do so by the usual method of punching out a hole on the right-hand side of the ballot opposite the preprinted name of the candidate. *See* section 2-35-9(e), Hawaii Administrative Rules. It is presently contemplated that the voted cards shall be placed in the write-in ballot envelope and the ballot and ballot envelope placed in a utility envelope which shall then be deposited into the

ballot box.

12. Ballots without write-in ballot envelopes will be processed in the usual manner as prescribed in chapter 16, Hawaii Revised Statutes, and title 2, chapter 35, Hawaii Administrative Rules. Ballots in write-in ballot envelopes will be opened, and the envelope and all ballot cards stamped with a common, unique number. The write-in ballot envelope and ballot cards will be compared for overvotes, i.e., a write-in and punched vote cast for the same office. If no overvotes appear, the ballot cards will be processed in the manner prescribed in chapter 16, Hawaii Revised Statutes, and title 2, chapter 35, Hawaii Administrative Rules.

13. The paper ballot process presents serious problems that are not covered by current election rules. One such problem is overvoting. Another problem is what to do with votes for Governor and Lieutenant Governor that are not cast in conformity with state law. Further problems include how specifically write-in votes must be cast, and how disputes about the validity, and legibility of write-in votes are to be resolved. Still another problem is how to deal with write-in attempts in county elections that have already been finally resolved under Hawaii Revised Statutes §§ 12-41. Exactly how the important legal questions of overvoting, legibility, and other matters will be dealt with are still under discussion as the State attempts to determine what the Court's decision means.

14. The last major election change implemented in Hawaii was in 1980, the first election held to elect trustees of the Office of Hawaiian Affairs. Although only 13.4% of all registered voters were permitted to vote in that election, long lines formed at many polling places as a result of the extra time voters and precinct workers needed to cast ballots for that election. Some voters who would have voted were turned away by the long lines, particularly between 7:00 a.m. and 8:30 a.m.,

and 4:30 p.m. and 6:00 p.m., traditionally the peak voting hours at the general election because few business and offices in the private sector are closed on general election day. Because of the limited period of time which election officials have had to design and test a system to cast, count and report write-in votes in Hawaii, the necessity for using material not specifically tailored to Hawaii's circumstances, and the newness of the experience in general, long lines, particularly at what traditionally have been heavy voting times, are expected.

15. In his capacity as the Deputy Director/ Elections Systems Planner, he is also responsible for supervising the review of petitions filed to form new political parties pursuant to section 11-62, Hawaii Revised Statutes. In 1986, because the total number of votes cast in the prior general election was 418, 904, the requisite number of signatures needed by a party seeking to be designated a political party and to secure access to Hawaii's 1986 general election ballot was 4,189.

Further Affiant sayeth naught.

/s/
Dwayne D. Yoshina

[October 3, 1986]
[Subscription Omitted in Printing]

ENGLISH FACSIMILE BALLOT

SIDE 1

CONG | SEN | REP

COUNTY OF HAWAII
STATE OF HAWAII

TOP

A

OFFICIAL BALLOT

GENERAL ELECTION

TUESDAY, NOVEMBER 4, 1986

This stub shall be removed by the Election Official only

U. S. SENATOR
Vote For Not More Than One (1)

- (R) HUTCHINSON, Frank
- (D) INOUYE, Daniel K.

U. S. REPRESENTATIVE
Vote For Not More Than One (1)

- (D) AKAKA, Daniel K.
- (R) HUSTACE, Maria M.
- (L) SCHOOLLAND, Ken

GOVERNOR AND LIEUTENANT GOVERNOR
Vote For Not More Than One (1) Party

- (R) ANDERSON, D. G. (Andy) For Governor; FELIX, John Henry For Lieutenant Governor
- (D) WAIHEE, John For Governor; CAYETANO, Ben For Lieutenant Governor

STATE REPRESENTATIVE
Vote For Not More Than One (1)

- (D) TAJIRI, Harvey S.
- (R) TAVARES, Larry L. T.

103 A

FACSIMILE

SIDE 2

I HAVE VOTED, HAVE YOU?

(OVER)

This stub shall be removed by the Election Official only

FACSIMILE

102

(OVER)

EXHIBIT

ENGLISH FACSIMILE BALLOT

SIDE 1

CONG | SEN | REP

COUNTY OF MAUI
STATE OF HAWAII

TOP

A

OFFICIAL BALLOT

GENERAL ELECTION

TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

U. S. SENATOR
Vote For Not More Than One (1)

- (R) HUTCHINSON, Frank
- (D) INOUYE, Daniel K.

U. S. REPRESENTATIVE
Vote For Not More Than One (1)

- (D) AKAKA, Daniel K.
- (R) HUSTACE, Maria M.
- (L) SCHOOLLAND, Ken

GOVERNOR AND LIEUTENANT GOVERNOR
Vote For Not More Than One (1) Party

- (R) ANDERSON, D. G. (Andy) For Governor; FELIX, John Henry For Lieutenant Governor
- (D) WAIHEE, John For Governor; CAYETANO, Ben For Lieutenant Governor

STATE SENATOR
Vote For Not More Than One (1)

- (D) SOLOMON, Malama
- (R) YOUNG, Peter

STATE REPRESENTATIVE
Vote For Not More Than One (1)

- (R) O'KEEFE, Mike
- (D) SCHUTTE, Sandy Pechter

113

VOTE BOTH SIDES (OVER) A

FACSIMILE

SIDE 2

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

MAYOR
Vote For Not More Than One (1)

- (D) MIURA, Marvin
- (R) TAVARES, Hannibal

COUNCILMEMBERS
NO DISTRICT RESIDENCY
Vote For Not More Than Two (2)

- (D) AIONA, Abe (Chick)
- (R) LINGLE, Linda
- (D) NAKASONE, Bob
- (R) VIVEIROS, Sam

CENTRAL MAUI
Vote For Not More Than Three (3)

- (R) MEYER, Marco M.
- (D) NISHIKI, Wayne K.
- (D) SANTOS, Velma McWayne
- (D) TANAKA, Joe Suzo

EAST MAUI
Vote For Not More Than One (1)

- (R) MORROW, Tom
- (D) OTA, Charles S.

MOLOKAI
Vote For Not More Than One (1)

- (D) KAWANO, Patrick S.
- (R) PEABODY, George G.

LANAI
Vote For Not More Than One (1)

- (D) HOKAMA, Goro
- (R) OLIVA, Henry

104

VOTE BOTH SIDES (OVER) A

FACSIMILE

ENGLISH FACSIMILE BALLOT

SIDE 1

CONG | SEN | REP | COUN

TOP

CITY COUNTY OF HONOLULU
STATE OF HAWAII

A

OFFICIAL BALLOT

GENERAL ELECTION

TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Officer only

U. S. SENATOR
Vote For Not More Than One (1)

(R) HUTCHINSON, Frank
(D) INOUYE, Daniel K.

U. S. REPRESENTATIVE
Vote For Not More Than One (1)

(D) HANNEMANN, Mufi
(L) HARRIS, Blake
(R) SAIKI, Patricia (Pat)

GOVERNOR AND LIEUTENANT GOVERNOR
Vote For Not More Than One (1) Party

(R) ANDERSON, D. G. (Andy) For Governor
FELIX, John Henry For Lieutenant Governor

(D) WAIHEE, John For Governor
CAYETANO, Ben For Lieutenant Governor

125

VOTE BOTH SIDES (OVER)

A

SIDE 2

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Officer only

STATE SENATOR
Vote For Not More Than One (1)

(D) KURODA, Joe (Jumbo)

STATE REPRESENTATIVE
Vote For Not More Than One (1)

(D) KIHANO, Daniel L. (Danny)
(R) SULLIVAN, William R. (Bill)

COUNCILMEMBER
Vote For Not More Than One (1)

(R) DEOCAMPO, Debra
(D) DEBOTO, John

110

VOTE BOTH SIDES (OVER)

A

ENGLISH FACSIMILE BALLOT

SIDE 1

CONG | SEN | REP | COUN

TOP

CITY COUNTY OF HONOLULU
STATE OF HAWAII

A

OFFICIAL BALLOT

GENERAL ELECTION

TUESDAY, NOVEMBER 4, 1986

This stub shall be removed by the Election Officer only

U. S. SENATOR
Vote For Not More Than One (1)

(R) HUTCHINSON, Frank
(D) INOUYE, Daniel K.

U. S. REPRESENTATIVE
Vote For Not More Than One (1)

(D) AKAKA, Daniel K.
(R) HUSTACE, Maria-M.
(L) SCHOOLLAND, Ken

GOVERNOR AND LIEUTENANT GOVERNOR
Vote For Not More Than One (1) Party

(R) ANDERSON, D. G. (Andy) For Governor
FELIX, John Henry For Lieutenant Governor

(D) WAIHEE, John For Governor
CAYETANO, Ben For Lieutenant Governor

STATE REPRESENTATIVE
Vote For Not More Than One (1)

(R) ANDERSON, Whitney T.

COUNCILMEMBER
Vote For Not More Than One (1)

(R) KAHAPEA, David Wilson
(D) [illegible]

135

A

SIDE 2

I HAVE VOTED, HAVE YOU?

(OVER)

This stub shall be removed by the Election Officer only

102

(OVER)

E[illegible]GLISH FACSIMILE BAL[illegible]OT

SIDE 1

COUNTY OF KAUAI
STATE OF HAWAII

TOP

A

OFFICIAL BALLOT

GENERAL ELECTION

TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

U. S. SENATOR
Vote For Not More Than One (1)

- (R) HUTCHINSON, Frank
- (D) INOUYE, Daniel K.

U. S. REPRESENTATIVE
Vote For Not More Than One (1)

- (D) AKAKA, Daniel K.
- (R) HUSTACE, Maria M.
- (L) SCHOOLLAND, Ken

GOVERNOR AND LIEUTENANT GOVERNOR
Vote For Not More Than One (1) Party

- (R) ANDERSON, D. G. (Andy) — For Governor; FELIX, John Henry — For Lieutenant Governor
- (D) WAIHEE, John — For Governor; CAYETANO, Ben — For Lieutenant Governor

FACSIMILE

199 **VOTE BOTH SIDES (OVER)** A

SIDE 2

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

STATE SENATOR
Vote For Not More Than One (1)

- (D) AKI, James
- (R) KAOPUA, Sherwood

STATE REPRESENTATIVE
Vote For Not More Than One (1)

- (D) APO, Peter K.

MAYOR
Vote For Not More Than One (1)

- (R) BARRETTO, John F., Jr.
- (D) KUNIMURA, Tony T.

COUNCILMEMBERS
Vote For Not More Than Seven (7)

- (D) ASING, Bill (Kaipo)
- (R) CHILDS, Patrick J.
- (D) CORREA, Maxine
- (D) FUKUSHIMA, Jesse
- (R) HOUSTON, John C.
- (R) KEKAHU, John, III (Butch)
- (D) KOUCHI, Ronald
- (R) [illegible]-DUARTE, Gloria
- (R) MEDEIROS, Abel
- (D) [illegible], Maurice A. (Joe)
- (R) [illegible] Chauncey W. Kaohelani
- (D) TEHADA, Jimmy
- (D) YUKIMURA, JoAnn A.
- (R) ZABLAN, Lionetta Haukana

FACSIMILE

166 **VOTE BOTH SIDES (OVER)** A

EN[illegible]LISH FACSIMILE BALL[illegible]T

SIDE 1

STATE OF HAWAII

TOP

B

OFFICIAL BALLOT

BOARD OF EDUCATION ELECTION

FIRST SCHOOL BOARD DISTRICT
(Island of Oahu)

TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

YOU MAY VOTE IN ALL THREE CONTESTS

No Departmental School District Residency
Vote For Not More Than Three (3)

- ARAKI, Mako
- ARRE, Toy
- BREWER, Jim
- CHONG, Howard K. Q., Jr.
- DILLINGER, Paul
- DOMINGO, P. C.
- FUNAKOSHI, Elayne
- HO, Peter H. P.
- HUGHES, James (Jim)
- IKN, Evelyn K. S.
- KAM, Thomas K. Y.
- KAWAHARA, [illegible] F.
- LEILANI, Frances
- LOO, Andrew
- MAGALDI, Joe
- MASUI, [illegible]
- MATSUMOTO, Mitchell
- MELLER, [illegible] (Artie)
- MON, Victor (Pinoy)
- NORWOOD, Chuck
- SATO, Ron
- SHORBA, Joe
- SOUTHARD, Ronald W. (Ronny)
- SUTTON, Warner Kiehe
- UWAINE, Clifford [illegible]
- WINTERS, William K. (Bill)
- WOODS, William E. (Bill)
- YOUNGQUIST, Arvid T.

FACSIMILE

303 **VOTE BOTH SIDES (OVER)** B

SIDE 2

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

YOU MAY VOTE IN ALL THREE CONTESTS

4th Departmental School District Seat (Central Oahu)
Vote For Not More Than One (1)

- AMANO, Reef
- McMILLEN, Frances

6th Departmental School District Seat (Windward Oahu)
Vote For Not More Than One (1)

- KNAPP, Paul
- PENEBACKER, John R.

FACSIMILE

302 **VOTE BOTH SIDES (OVER)** B

ENGLISH FACSIMILE BALLOT

SIDE 1

STATE OF HAWAII — TOP — **B**

OFFICIAL BALLOT

BOARD OF EDUCATION ELECTION

SECOND SCHOOL BOARD DISTRICT
(Counties of Hawaii, Maui and Kauai)

TUESDAY, NOVEMBER 4, 1986

This stub shall be removed by the Election Official only

2nd Departmental School District Seat (Maui)
Vote For Not More Than One (1)

- ARBOR, Kelly
- UEOKA, Meyer M.

301 — **B**

SIDE 2

I HAVE VOTED, HAVE YOU?

(OVER)

This stub shall be removed by the Election Official only

102 — (OVER)

ENGLISH FACSIMILE BALLOT

SIDE 1

STATE OF HAWAII — TOP

OFFICIAL BALLOT

BOARD OF TRUSTEES OFFICE OF HAWAIIAN AFFAIRS ELECTION

TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

YOU MAY VOTE IN ALL THREE CONTESTS

"AT LARGE" TRUSTEE
(To Be Voted On Statewide)
Vote For Not More Than Three (3)

- BURGESS, Rod [illegible]
- CHUN, Kaliko S.
- CLARK, Melvin Kaulia
- DE OCAMPO, Mary [illegible]
- DELA CRUZ, Linda [illegible]
- DESOTO, A. Frenchy
- FULLER, Robert
- HIGA, Odette [illegible]
- HOLT, Robin
- KAHAU-GILL, Rita [illegible]
- KAPANA, Abraham [illegible]
- KEALOHA, Gary
- KEKIPI, Velma P. [illegible]
- KEPOO, Arthur
- KINNEY, Richard [illegible]
- KIPILII, Franklin
- MAHOE, Kaydn M. K. [illegible]
- MOKIAO, Myrtle M.
- PREJEAN, [illegible]
- REIS, [illegible]
- RITTE, Walter, Jr.
- ROWLAND, James [illegible], Jr.
- STUDEBAKER, Viola [illegible]

MAUI RESIDENT TRUSTEE
(To Be Voted On Statewide)
Vote For Not More Than One (1)

- KAHAIALII, [illegible]
- TERUYA, Christine Kong

701 — **VOTE BOTH SIDES (OVER)**

SIDE 2

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

YOU MAY VOTE IN ALL THREE CONTESTS

OAHU RESIDENT TRUSTEE
(To Be Voted on Statewide)
Vote for Not More Than One (1)

- CHING, Clarence F. T.
- DELANEY, Linda L.
- EPSTEIN, Pearl Kong
- SELLERS, R. Lunalilo
- SERRAO, Joseph F.
- SING, Albert K.
- SOLLER, S. C. Tony [illegible]

702 — **VOTE BOTH SIDES (OVER)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,	)	Civil No. 86 0582
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MORRIS TAKUSHI, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING MOTION FOR STAY, SUSPENSION, OR MODIFICATION OF INJUNCTION

Defendants' Motion for Stay, Suspension, or Modification of Injunction came on for hearing before this court on October 7, 1986. Mary Blaine Johnston, Alan Burdick, and Daniel Foley appeared on behalf of plaintiff, and Deputy Attorneys General Steven Michaels and Charleen Aina appeared on behalf of defendants. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

On September 29, 1986, this court entered an order granting plaintiff's motion for summary judgment and for permanent injunction, and ordering defendants to provide for the casting, counting, and considering of write-in votes in the Hawaii general election to be hold on November 4, 1986. Defendants filed a notice of appeal to the Court of Appeals for the Ninth Circuit on the following day.

On October 3, 1986, this court granted defendant's *ex parte* motion to shorten time for hearing of the instant

motion, filed simultaneously with the order shortening time. Plaintiff filed a memorandum in opposition on October 6, 1986, and defendants filed a reply memorandum later on the same day.

The instant motion requests that this court stay its order pending consideration by the Court of Appeals, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. Defendants have submitted a thorough and candid explanation of the points on which they seek reversal of this court's previous order. However, as plaintiff correctly notes, any new arguments, citations, and factual allegations are improper in a motion to stay an injunction pending appeal. A motion to stay is not a substitute for a motion to reconsider. Once a notice of appeal has been filed, the district court no longer has jurisdiction to weigh the merits of the case at that time. *See Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1392 n.1 (9th Cir. 1984).

Nevertheless, this court's conclusion that defendants have raised no arguments which would warrant reconsideration, coupled with the possibility that the Court of Appeals might otherwise mistake the grounds upon which this court relies, compels the court to discuss the contentions now made by defendants. The Court of Appeals may eventually conclude that this court is obliged to resolve these new matters before an appeal will lie. Recognizing that this case must be concluded within the next few weeks, this court will, as a practical matter only, conduct the reconsideration which defendants obviously desire but are loath to request. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400 (1982).

I. Jurisdiction

Defendants suggest rather tentatively that "plaintiff lacks standing to obtain the injunctive relief awarded, particularly with respect to elections in which he is not

eligible to vote." Memorandum in support of motion ("DM") at 1. This point was not resurrected in oral argument. Without identifying the nature of this alleged standing defect, defendants cite generally to *Bender v. Williamsport Area School District*, ___ U.S. ___, 106 S. Ct. 1326 (1986), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660 (1983).

If defendants are attempting to argue that plaintiff has failed to allege a case or controversy, their reliance is misplaced. *Bender* involved the question of whether an individual school board member, who had been sued only in his official capacity, had standing to *appeal* in his individual capacity when the majority of the Board had decided not to challenge the trial court's ruling. *Lyons* held that past practices of the defendants do not justify consideration of an injunction unless there is a credible threat of immediate and irreparable harm ("Lyons' lack of standing [rests] on the speculative nature of his claims that he will again experience injury," 461 U.S. at 109, 103 S.Ct. at 1669). Obviously, plaintiff here is not in a position analogous to that of Bender or Lyons. He seeks to exercise his First Amendment rights, rights which the defendants have specifically stated their intention not to recognize.[1]

As to the suggestion that plaintiff cannot obtain injunctive relief with respect to elections in which he is not eligible to vote, the court finds it also to be meritless. Under certain circumstances, plaintiffs may represent the constitutional rights of persons not before the court. *Population Services International v. Wilson*, 398 F. Supp. 321 (S.D.N.Y. 1975) (three judge court), *aff'd sub nom. Carey v. Population Services Intern.*, 431 U.S. 678, 97 S. Ct. 2010 (1977). To claim that only the elections in

[1] Curiously, defendants appear to argue on the one hand that plaintiff has no standing to bring this action, and on the other that he has waited too long in bringing it (see laches discussion, *infra* at 31).

which Mr. Burdick will vote should provide for write-in votes is analogous to saying, in a different context, that only Mr. Miranda himself is entitled to receive warnings against self-incrimination.

Even if this court's ruling were now properly restricted only to electoral contests in which plaintiff may cast his vote, however, as a practical matter defendants face the prospect of forced compliance in all races. Whether a voter asks for a write-in envelope or simply marks his ballot with a write-in vote, he is exercising his First Amendment privilege as found by this court to be proper. For defendants to delay compliance until assured that at least one voter in every electoral contest desired to cast a write-in vote would be pointless.

II. Standard for Adjudication of Motion

Rule 62(c) of the Federal Rules of Civil Procedure provides, in part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rule 62(c) does not give the district court jurisdiction to "adjudicate anew" the merits of the case, but merely allows the court to preserve the *status quo* during the pendency of appeal. *McClatchy Newspapers v. Central Valley Typo., Etc.*, 686 F.2d 731 (9th Cir.), *cert. denied*, 103 S.Ct. 491 (1982).

Defendants urge the court to preserve the *status quo* by staying its earlier order, thus permitting the November 4 election to go forward as they had planned it prior

to September 29, 1986. At several points in their memorandum, defendants request a "temporary stay" covering only the imminent election. *See, e.g.*, DM at 31.

As the court noted at the hearing, what defendants fail to recognize, and what plaintiff too may have overlooked, is that this court's order necessarily applies *only* to the November 4, 1986 order. The problem stems from the fact that the ban on write-in votes is a bureaucratic decision,[2] not a legislative act. As the parties earlier agreed at the hearing of the motion for summary judgment, Hawaii law neither prohibits nor provides for write-in voting.[3] Only defendants' unilateral decision not to implement such a procedure in the upcoming election is before this court. Conceivably, the State could, through future legislation or executive fiat, provide for the write-in votes found by this court to be an expression protected by the First Amendment: therefore, the issue as to whether rights may be deprived in the future is not yet ripe. Consequently, to grant the "temporary stay" sought by defendants would be to moot the issue on appeal by giving defendants that which they initially asked for, to wit, no need to provide for write-in voting for the upcoming general election.

Nevertheless, the court will review the factors relevant to deciding a motion for stay pending appeal, which include (1) the likelihood that appellants will ultimately prevail on the merits, (2) the extent to which appellants will be irreparably harmed by denial of the motion, (3)

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[2] In its earlier order, this court gave defendants the benefit of the doubt in applying the test set forth in *Anderson v. Celebrezze*. 460 U.S. 780 (1983). A reviewing court might find that such a test is not even applicable to a decision by administrative officials not to recognize constitutional rights, rather than an explicit legislative act.

[3] Defendants' citation to *Jensen v. Sec'y of Haw., et als.* [sic], 40 Hawaii 604 (1954), does not affect this conclusion. *See* discussion *infra*, at 9-12.

the potential harm to plaintiff if the stay is issued, and (4) the public interest. *Turner v. Woods*, 559 F. Supp. 603. 619 (N.D. Cal. 1982), *aff'd*, 707 P.2d 1109 (9th Cir. 1903), *rev'd on other grounds*. 468 U.S. 1305, 105 S.Ct. 1138 (1985).

In this case, defendants' reliance an "state interests" concerning elections appears functionally equivalent to their view of the public interest in orderly and informed elections. Conversely, plaintiff equates the public interest with the right to exercise First Amendment freedoms. These conflicting positions weigh heavily in the determination of the likelihood of success on appeal. Accordingly, this court will defer consideration of factors (1) and (4) to a later stage of this opinion (*see* Section V, *infra*).

As to claimed irreparable harm to appellants, defendants argue that the possible confusion caused by write-in voting constitutes such bars. Obviously, though, any harm arising from confusion affects only the public interest in fair and informed elections, and not the defendants personally.[4] Even if this court's order did somehow enjoin the State from effectuating its statutes, as claimed by defendants, *see New Motor Vehicle Board v. Orrin W. Fox Co.* 434 U.S. 1345 1351 (1977) (Rehnquist, J., in chambers), the State is not a defendant herein. Consequently, harm to the State -- in effect, harm to the people -- is a consideration weighing in analysis of the fourth *Turner* factor, and not the second.

The court finds that defendants themselves will suffer no irreparable bars should the instant motion be

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[4] Defendant Waihee is the Democratic candidate for governor and thus might suffer personally from election confusion. To the extent that he is able to avoid the apparent conflict of interest posed by his role as Chief Elections Officer, however, he does not appear in the lawsuit in his individual capacity. Any bars to his candidacy from the possible confusion is therefore irrelevant.

denied. Any administrative burden and inconvenience to the technicians in running the election with provisions for write-in votes does not rise to the level of irreparable harm.

Plaintiff, on the other hand, has already demonstrated the potential harm he will suffer if this court stays its order. Defendants' argument that plaintiff has suffered no monetary harm evades the issue. Where interference with a plaintiff's First Amendment rights is demonstrated to have occurred as a result of governmental action, irreparable harm is presumed. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976). The court therefore would find that the irreparable harm to be considered in this motion falls decidedly on the side of the plaintiff.

III. Hawaii's Elections System

Defendants criticize this court for allegedly failing to consider the prohibition[5] on write-in voting within the context of the Hawaii election process, or in comparison with other states' restrictions on voting rights. Because defendants raise many of these arguments for the first time in the instant motion, the court will address each concern voiced in defendants' memorandum.

A. Origin of the Prohibition on Write-in Votes

Defendants now contend that the Hawaii statutory scheme prohibits write-in votes, at least implicitly. At

[5] In their response to plaintiff in July, and in their opposition to the motion for summary judgment, defendants took the position that Hawaii law was silent regarding the implementation of write-in voting. This court therefore found the facts to be undisputed that the State neither permitted nor precluded such votes. Defendants have recently changed their position, arguing that Hawaii actually has an outright ban on such use of the franchise. Although this court is persuaded that the only such restriction originates in the Office of the Lieutenant Governor, the general term "prohibition" will be employed for purposes of this opinion.

oral argument, defendants identified two statutes as the source of the ban. Hawaii Rev. Stat. § 12-2 provides, in part, "No person shall be a candidate for any general or special general election unless he has been nominated in the immediately preceding primary or special primary."[6] Hawaii Rev. Stat. § 16-26(1) merely states in pertinent part that a "questionable ballot" (including one which bears "any mark or symbol contrary to the provisions of law") will be set aside as uncounted.

Clearly, § 616-26(1) cannot itself be the source of a ban on write-in votes. Only if the statutory scheme elsewhere provides that write-in votes are prohibited would this section apply.

Defendants have not identified any explicit prohibition on this exercise of the franchise. Their reliance on § 12-2 as implying a ban seems misplaced. First, although this court does not so find, it is possible that the statute is intended only to place restrictions on ballot access, and not on the ability to mount a write-in campaign. Furthermore, the plain meaning of the section would bar only the actual *eligibility* of certain candidates; it does not prohibit a voter from attempting to cast his vote for such a person. Moreover, even at its most liberal construction, § 12-2 does not prevent a write-in campaign at the primary election stage. This irrefutable fact directly contradicts defendants' position that Hawaii permits write-in voting at *no* stage of the electoral process.

Nevertheless, defendants now claim that, "[s]o far as research has been able to disclose, Hawaii has never had write-in voting." The basis of this conclusion appears to be defendants' new-found reliance on *Jensen v. Sec'y of Haw., et als.* [sic], 40 Hawaii 604 (1954), a case which defendants claim stands for the proposition that write-in

[6] This is presumably also the basis for defendants' contention that Hawaii has enacted a "sore loser" statute, *see infra* at 14.

votes violate Hawaii Rev. Stat. § 16-26(1). Defendants also argue that the "presumption of interpretation animating the court's opinion" was that allowing write-in voting "would radically change both the primary and [general] election laws." DM at 8.

This court has considered the *Jensen* case and concludes that it does not stand for the holding which defendants have ascribed to it. In *Jensen*, the Hawaii Supreme Court did invalidate the provision of Act 318 of the territorial legislature, permitting write-in voting. The Act, however, covered two subject matters: (1) voting by machine and the purchase of such machines and (2) authority to write in the names of candidates on the ballot. The court found that, because the title of the Act mentioned only the first purpose and not the second, it violated Title 45 of the Organic Act, which requires each law to "embrace but one subject, which shall be encompassed in its title." The *Jensen* court expressed concern about "hodge podge or log-rolling" legislation which might foist surprise and fraud on the legislature and the public by failing to reveal all subject matters of a bill by its title. Accordingly, the court invalidated the non-titled subject in Act 318, which happened to be write-in voting.

Far from declaring that write-in voting was impermissible, the court recognized that many states permit write-in ballots and that "[t]his may be highly desirable and exists in many communities." 40 Hawaii at 615. However, the court decided that such permission was a matter for legislative discretion. *Id.*

Most importantly, the *Jensen* court specifically avoided the constitutional implications of its ruling, noting that "[n]o claim [was] made that the Hawaiian statute violated any provision of the United States Constitution. . . ." *Id.* at 613. The court held only that the legislature could not have intended to pass the bill allowing write-in votes,[7] and that no such provision should be allowed to stand until the legislature had an opportunity to consider it in conformity with Section 45 of the Organic Act. However, as noted, the court did not consider the constitutionality of banning write-ins.

B. Participation Rights of Hawaii Voters

Defendants also purport to look to the "larger context of extremely liberal participation rights set forth explicitly in a carefully crafted 'reticulated statutory scheme'" in order to justify the prohibition against write-in votes. DM at 8. They note, for example, that every voter may vote in the primary of his choice, that voters are not confined to a single" nominating act," that placement on the ballot of a voter's candidate is subject to minimal restriction, and that a candidate is *guaranteed* a spot on the general election ballot by collecting signatures equivalent to 1% of the registered electorate. Defendants would therefore have the court find that the prohibition on write-in votes is of small or no significance, "at least at the primary [election] stage."

All of these activities in which voters are free to engage during the primary election process serve only one goal: to give a concerned voter the opportunity to place his candidate on the ballot, and to allow the candidate

---

[7] The court's reasoning is somewhat disingenuous. It holds that "there was no intent on the part of the legislature to grant such a privilege even though it comes within the wording of the statute." 40 Hawaii at 611-12. The court speculates that the provision was overlooked because the bill was passed in the last few days of the legislative session (equally probable, of course, is that the write-in language was deliberately inserted to allow voters using the new voting machines to cast votes in the same manner as those who did not use the machines). Having struck down the explicit provision for write-in votes, the court then finds that the inclusion of language allowing write-in votes indicates that there was no former right to cast such a vote, and that the court's act in striking down the Act means that there remained no allowance of write-in votes.

to secure that spot. What defendants fail to recognize is that these ballot access measures at the primary stage are meaningless if dissatisfied voters will subsequentiy be restricted in their choice to the individuals whose names appear on the ballot in the general election. As the court has repeatedly noted, ballot access regulations are irrelevant to the issue of whether the State can restrict the actual casting of votes.

The inquiry cannot end at the primary election stage. It is insufficient for the State to take a position which can be summarized as a statement to the voters, in effect, that a failure to place one's candidate on the ballot precludes a voter from exercising his franchise however he pleases. Among other concerns, this attitude would completely ignore the possibility that changes in the political climate after the primary election might prompt voters to back a legitimate and qualified candidate not among those printed on the ballot. This court therefore finds that the participation rights accorded Hawaii voters, however laudable, are inadequate to meet the First Amendment rights of those voters.

C. Interests Served by the Electoral System

This court does not disagree with defendants' general statement that Hawaii's electoral system may place restrictions on who may serve if elected and even on whether votes will be counted or in any way considered. Obviously, there exists no unfettered right to have one's vote counted. Examples of truly meaningless votes include ballots left deliberately blank, spoiled ballots, illegible votes, and those cast for unidentifiable candidates. Nevertheless, the concerns identified by defendants as having been addressed by the present electoral system do not require the adoption of an absolute prohibition by the Chief Elections Officer against write-in votes.

1. Combatting Unrestrained Factionalism

The defendants spend such time discussing the so-

called "sore loser" issue; that is, when a party candidate is defeated in the primary election but continues to seek election in the general election. The United States Supreme Court has indeed recognized that the preclusion of intraparty feuding is a valid state interest. *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274, 1281 (1974) ("The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences").

Some states have addressed this issue by enacting "sore loser statutes," which disqualify a candidate defeated in the primary election from eligibility to run in the next general election. Whether Hawaii's electoral system incorporates such a rule is an open question not currently before this court.[8]

This court acknowledges that such measures serve state interests which are at least rational. Yet, no court, including this one, has ever ruled that a sore loser statute, if one exists in Hawaii, is either valid or invalid. More importantly, the existence or nonexistence of such a provision has little bearing on the constitutional right to cast a write-in vote. A sore loser statute affects whether or not particular candidates can *serve*, not whether a voter can cast a vote for those candidates or for others not appearing on the ballot.

A flat ban on write-in votes is overbroad to protect the asserted interest in discouraging factionalism. Although it may dissuade the supporters of a defeated candidate from continuing their campaign, it also needlessly prevents voters from casting their desired votes for an

---

[8] One of the factors on which defendants pin their hopes of reversal is the alleged imminent consideration by the United States Supreme Court of the constitutionality of Washington's sore loser statute. As is discussed further, *infra* at 19-22, the defendants herein are mistaken in their understanding of the issues before the Court in the *Munro* case, and in the possible effect on this lawsuit of the Court's possible ruling.

otherwise legitimate and qualified write-in candidate who did *not* lose in the primary.

2. Maintaining Informed Voting and Avoiding Vacancies

Defendants further argue that a ban on write-in voting, by preventing late-blooming candidacies between the primary and general elections, serves the allegedly compelling interest of ensuring that the array of candidates available for voter selection includes only persons who have met valid constitutional and statutory requirements for holding office, have at least a modicum of support, and are able and willing to serve if elected. They also argue that the State can properly seek to avoid vacancies in elected offices.[9]

The court will have occasion to discuss this supposed problem at greater length. *See* Section V.B., *infra*. For now, it suffices to say that while a ban on write-in voting does indeed accomplish this objective (the compelling nature of which is questionable), it also prevents a voter from casting a vote for the candidate of his choice, even if that person is legitimately qualified and prepared to hold office.

In short, the court does not quarrel with defendants' assertion that Hawaii has some interest in ensuring that only qualified candidates are elected to public office. *Hayes v. Gill*, 52 Hawaii 251, 254 (1970) *appeal dismissed*, 401 U.S. 968 (1971). An outright ban on write-in voting, however, is too broad a restriction to serve the stated objective. As the Hawaii Supreme Court has

[9] The case cited by defendants for this proposition, *Lynch v. Illinois State Bd. of Elections*, 682 F.2d 93, 97 (7th Cir. 1982), involved the question of whether a vacancy could be filled by appointment rather than by election. The court answered that question in the affirmative. This court assumes that defendants do not claim that the need to fill vacancies would justify doing away with elections entirely.

noted, in a case cited by defendants,

> The fundamental interest to be protected here is that of the people of the [affected political district] in choosing whomever they please to represent them . . . . The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government.

Akizaki v Fong, 51 Hawaii 354 (1969) (emphasis supplied). As this court attempted to explain in its order granting summary judgment, a distinction exists between the proper regulation of candidates and the impermissible restriction of the franchise.

IV. The Nature of the Injunction

Defendants bemoan the alleged fact that "[u]nder this court's injunction, Hawaii's carefully tailored scheme for fostering informed, broad participation in the electoral process lies torn in shreds." DM at 17. This court does not believe that its injunction in this case will have the destructive effect attributed to it by defendants, nor is this court persuaded that defendants' prohibition on write-in votes is the result of any carefully tailored scheme. Rather, the arbitrary decision not to adjust the current voting procedures to provide for write-in votes seems to reflect a lethargic tradition of pursuing the path of least resistance.

At oral argument counsel for defendants invited the court to clarify the nature and the extent of its ruling. Because the court considers that most, if not all, of the ambiguities identified by defendants are simply imagined, it will address only the concerns raised by defendants in support of the instant motion.

First, defendants' complaints that the injunction amounts to doing away with the system of placing candidates on the ballots is simply incorrect. The vast major-

ity of candidates who can avail themselves of the opportunity to qualify for a position on the general election ballot will not rely on the possibility of success through a write-in campaign, but will instead vigorously seek to comply with the State's legislation providing for nomination through the primary election procedure. The validity of those requirements has not been challenged, and the court's injunction should not be interpreted as abrogating any of the provisions set forth in the present statutory election provisions. Furthermore, allowing a write-in vote is not inconsistent with the safeguards designed to ensure that a selection of qualified candidates appears on the ballot.

Defendants also claim that even candidates in uncontested races will be forced to continue campaigning "because of the fortuity that non-county office candidates in uncontested races are not deemed elected as of the date of the primary." DM at 17. The court does not view this circumstance as a fortuity. The legislature could have enacted a provision declaring such candidates elected as of the primary, but it chose not to do so. Defendants' position would relegate the general election, a forum traditionally left open to the voicing of public opinions and preferences, to a mere formality.

Another potential problem with the injunction seen by defendants is the possibility that "in the coming weeks declaratory actions may be filed in state or federal court to have particular candidates found eligible or ineligible to serve if elected on a write-in campaign." DM at 18. Defendants fear that, even if trial courts could pass on the merits of these cases, there would be (1) no time for appellate review, and (2) a danger of inconsistent rulings.

Although the court does not dismiss such a possibility, it appears that defendants' alarmist arguments[10] envision a problem greater in theory than in fact. At the least, it would seem to the court that the same laches argument which proved unsuccessful in this action would still be available to the State if timely raised in these possible declaratory judgment actions, and it would apply with increasingly greater force as each successive day passes.

Finally, defendants maintain that the only sure result of permitting write-in voting will be that no voter "will have the faintest idea whether a write-in vote can in any fashion affect the outcome of the election." DM at 19. The court does not believe that the availability of an opportunity to write in will so perplex the electorate. However, even if such is the case, and a voter's perception of the effect of a write-in vote is that it may serve no valid purpose, he would then be more likely to take refuge in the list of candidates whose names appear on the ballot, insofar as that positioning represents a guarantee that those candidates are at least arguably qualified.

V. Merits of the Appeal

Defendants have advised this court of six arguments which they intend to pursue on appeal. As this court has already noted, the merits of those grounds are inextricably intertwined with the public interest as it relates to a

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[10] Defendants argue that some electoral contests will "grind to a halt" while the issue of eligibility is decided. This statement overlooks at least four facts. First, a write-in candidate must win before this is a real concern. Second, defendant Waihee himself is charged with determining eligibility, so that only a legitimate dispute as to his decision need go to the courts. Third, some candidates will be indisputably eligible to serve and can be certified as such virtually immediately. Fourth, there are a limited number of grounds for disqualification, at least some of which have already been litigated. *See, e.g., Hankins v. State*, 639 F. Supp. 1552 (D. Hawaii 1986) (five-year durational residency requirement is a valid restriction on candidates for governor).

motion pursuant to Rule 62(c). Consequently, the court will consider each argument not only as to its likelihood of success, but also insofar as it appears to affect the public interest.

A. Imminent Consideration of "Sore Loser" Statutes by the Supreme Court

Defendants correctly note that this court has found that a voter has the right to cast a vote in the general election for a candidate who has lost in a primary election. What defendants do not mention is that the court did not hold that such a candidate may serve if elected. As discussed above, the existence and the validity of a "sore loser" statute in Hawaii has yet to be contested or decided. In this area, the court's previous ruling stands only for the proposition that, even if a candidate is declared ineligible in advance of the election, State officials may not preclude a voter from casting a write-in vote for that candidate.[11]

The main thrust of defendants' appeal on this point, evidently, is that the appeal of *Socialist Workers Party v. Secretary of State*, 765 F.2d 1417 (9th Cir. 1985), *prob. jur. noted sub nom. Munro v. Socialist Workers Party*, No. 85-656, 106 S.Ct. 783 (1986), is proceeding to oral argument on the day of this court's hearing of the instant motion, and that the Supreme Court "will thus be presented with the legality of a "sore-loser" statute, which, like Hawaii law" may erect the barriers previously identified by this court as impermissible. DM at 20.

First, this court does not find the source of the prohibition established by defendants to be equivalent to a sore loser statute. Not only is Hawaii's ban bureaucratic rather than legislative, but it also is much broader than a sore loser statute.

Second, and more importantly, this court has reviewed the *Socialist Workers Party* Court of Appeals decision which has been appealed to the Supreme Court, and it has also read the appellant's briefs, which have been provided to the court by the defendants in this case. Nowhere can the court locate the issue identified by defendants herein, *i.e.*, the validity of a sore loser statute.[12] The issue on appeal in *Munro*, as shaped by the appellants themselves in that case, is whether a State may prohibit the nominee of a "minor party" from appearing on the general ballot unless he receives at least 1% of the total primary vote.

If Washington's sore loser statute was truly at issue in *Munro*, if Hawaii indisputably had a valid sore loser statute, and *if* the effect of that statute was material to the court's decision in this case, a stay of the injunction, as defendants urge, would be seriously considered by this court as serving some useful purpose. Simply to stay the court-ordered write-in voting provision because Washington's restriction on minor party access to the ballot may be found constitutional, however, is illogical and unwarranted.

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[11] Some observers, including defendants, may view such a use of the franchise as an exercise in futility, or at least as a frivolous misuse of the right to vote. Nevertheless, in the opinion of this court, defendants are not in a position to pass judgment upon the values of others. A voter cannot be deprived of the right to cast such a vote any more than he may be prevented from spoiling his ballot, from voting for a deceased or fictitious person, or from failing to cast a vote at all. Each of these approaches to the ballot constitutes a mode of expression, the freedom to exercise which is guaranteed by the First Amendment.

[12] The Circuit Court opinion notes only that Washington has a sore loser statute (a fact belied by appellants' argument that mounting a write-in campaign provides "a second chance to have voters express their approval or disapproval," *see* Appellants' Brief at 10), but then holds that writing in "is not an adequate substitute for having the candidate's name appear on the printed ballot." 765 F.2d at 1419. It is therefore arguable that the Washington sore loser statute actually permits voters to write in the losing candidate's name.

The pendency of a "voting rights case" before the Supreme Court does not automatically oblige lower courts to suspend all orders in the same general field. Such a result would be tantamount to requesting that this court suppress a confession in a criminal prosecution because the Supreme Court had before it an unrelated Fifth Amendment case. *Munro* is a ballot access case which does not address the issue of voters' rights *per se*. As the appellants in *Munro* recognize, in seeking to distinguish Washington's restriction on minor parties,

> When a citizen is denied the right to vote, or the right to cast a vote that has the same weight as any other vote, strict scrutiny is obviously appropriate.

Appellants' Reply Brief at 5. In the instant case, in contrast to *Munro*, that issue is squarely before the court.

Defendants make the tangential argument that, even if this court's ruling is not in potential conflict with *Munro*, it is in actual conflict with the opinion in *Hall v. Simcox*, 766 F.2d 1171 (7th Cir, 1985). That case, as this court noted in its earlier order, is also a ballot access case, unlike the situation before this court. Its only value to defendants in this case is the circuit court's stray comment that, "as a practical matter, [a ban on write-in votes] is a trivial matter." 766 F.2d at 1173.

This casual remark by the circuit court was made in the context of a decision as to whether a requirement that a candidate secure signatures equal to 2% of the registered voters is an unreasonable restriction on access to the ballot in combination with other election laws. Moreover, the court said only that as a *practical* matter a ban on write-ins was trivial when viewed in light of the ballot access restriction.

Finally, to the extent that the Court of Appeals for the Seventh Circuit in *Simcox* actually intended to minimize the importance of the right to cast a write-in vote,

this court believes that court used an unfortunate choice of words. It is significant that the decision of the appellate court provides no authority whatsoever for its statement.

This court agrees with defendants that election laws must be viewed as a whole.[13] This approach does not mean, however, that an unconstitutional law can be saved by mere coexistence with several constitutional laws. There must be some interrelationship among the laws which makes them valid as a unit. The relevant analysis is whether the rights abridged by the questioned law are compensated for by the other provisions in the overall electoral scheme.[14] Even *Unity Party v. Wallace*, 707 F.2d 59, 62 (2nd Cir. 1983), a case relied on by defendants, found that "the State provided an alternative [write-in voting] by which the individual appellants could

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[13] Defendants cite *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984), in support of the proposition that expression, including the casting of a vote, is subject to reasonably restraints on time, place, and manner. Aside from the fact that this position conflicts with defendants' argument that "when the state holds elections, it is doing so [only] to determine a winner who can serve," DM at 22 n. 11, this court cannot imagine a more reasonable time, place, and manner of expressing one's views of the voting process than by casting a write-in vote in the State's general election. Furthermore, to the extent that defendants seriously contend that a general election is not a forum for the expression of political opinions, but only a place "to choose winners," the court rejects this argument. To claim that the voters serve the function merely of mechanically determining who will take office is to rob the right to vote of its First Amendment protection.

[14] Defendants claim that the State can ignore votes for ineligible candidates by refusing to count them or to provide a forum to facilitate such "speech". Their reliance on *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980), is somewhat bizarre. That case held that the states have no affirmative duty to make certain that medicaid funds are available to pay for abortions for indigent women. Moreover, Hawaii's desire to ignore invalid votes does not address the question of how it should or would consider *valid* votes.

have exercised their rights to vote and to politically associate." In Hawaii's case, this court finds that no alternative measures make up for the prohibition against write-in votes.

B. Qualification Procedures

Another point which defendants apparently intend to raise on appeal is this court's alleged action in sweeping away a vast number of statutory provisions. Defendants claim that they will be forced to count votes for candidates who have, by initiating "late-blooming" campaigns, circumvented the State's requirements concerning nominating papers and that the injunction opens the possibility that a candidate with no intention of serving will be elected.

The basis of this argument, as the court views it, is an overreaction to the court's order. As this court has attempted to explain, *supra* at 16-19, that order did not strike down the State's valid regulations regarding filing and candidacy. Indeed, the court's order did not even address itself to the right to be a candidate. The narrow issue considered by the court was whether a voter can cast a write-in vote in the general election. The decision on that issue does not "automatically invalidate every state regulation in this area . . . . Even a burdensome regulation nay be validated by a sufficiently compelling state interest." *Carey, supra*, 431 U.S. at 686, 97 S.Ct. at 2016.

The heart of the court's order, a message consistently ignored by defendants, is that a voter has the opportunity to cast a write-in vote, but that he is not guaranteed, absent some indication from defendants, that his candidate will be able to take office. This is a risk that the voter consciously takes by deviating from the choice presented by the printed ballot. It does not mean, however, that the State can simply ban write-in votes because some voters may exercise the franchise in a manner that

appears unreasonable to election officials.

A fundamental distinction which the court makes is between disqualifying a candidate from serving, for some legitimate reason, and precluding a voter from voting in the way he feels is most proper, simply because election officials fear that he will not vote intelligently if he is allowed to write in. The basis for the court's earlier ruling was a finding that the prohibition which defendants seek to enforce is not merely a ban on all speech, but a content-based distinction which the court finds to be impermissible under the First Amendment.[15]

C. Chaos and Confusion

The aspect of this court's order which defendants find to be "the most disturbing" is the supposed inconsistency in holding on the one hand that it is desirable to seat candidates preferred by a plurality of the electorate, and on the other hand that this court will refrain from ruling at this time on the eligibility of a prevailing write-in candidate. Again, defendants have read more into this court's order than exists.

The court's refusal to pass on the eligibility of any particular candidate to take office stems from the "case or controversy" language of Article III of the Constitution. This standing requirement "tends to assure that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

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[15] This distinction may be illustrated with reference to *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780 (1971). The exhortation on Cohen's jacket was found to be protected speech. The finding of constitutionality did not require, however, that the draft administrators comply with Cohen's wishes as expressed on his clothing. Similarly, a voter has the right to express his desire that a particular candidate be elected. State officials must acknowledge that wish by allowing its expression; however, they need not honor the request if the candidate is otherwise ineligible or unqualified to take office.

Bender, supra, at 1326. The court does not suggest that an ineligible candidate who prevails in the election could or should take office, but merely that the issue of eligibility in any given instance is one that the court cannot prejudge in the abstract. Thus, if a prevailing write-in candidate were found to be truly unqualified for office, the court has not prejudged his eligibility by finding in advance that he must be seated regardless of any objections to his qualifications.

This court can envision three types of potential write-in candidates: (a) qualified but ineligible candidates (such as sore losers, if there is a statute barring their election), (b) unqualified -- and therefore ineligible -- candidates (such as persons who do not meet age or residency requirements), and (c) qualified and eligible candidates. Defendants' position fails to distinguish among these groups and thereby bans voters from casting a write-in vote for *any* of them, whereas at least the third group appears facially entitled to take office if elected.

Defendants quibble with the court's use of the terms "count" and "consider" in the context of tallying write-in votes. These terms were used by the *Rhodes* and the *Canaan* courts, and the import intended by this court was not that defendants should give each vote equal validity regardless of whether it is cast for a name printed on the ballot, a genuine write-in candidate, a sore loser, or a fictitious character. The court's order requires only that defendants acknowledge the fact, if true, that Candidate X, even if he is later determined to be unqualified, received 17 votes for Governor. That result represents the political expression of 17 people who have the right to have their votes counted. Defendants must also consider the votes. In this example, that consideration will lead to the conclusion that the votes have been cast for an unqualified candidate. Those votes will not affect the election, in the same way that spoiled or blank ballots

will not affect the outcome, but they will have been "counted" and "considered" equally with all other votes.

In sum, the court believes that defendants have overvalued the uncertainty which will be caused by having write-in voting available in the upcoming election. Defendants advance only theoretical and speculative arguments unsupported by the record.[16] In addition, this court's refusal to pass in advance on the eligibility of any candidate reflects only the practical consideration that no such ruling is necessary until a write-in candidate receives a plurality of the votes, yet is considered ineligible to take office for some reason as to the nature of which the court could now only speculate.

D. Administration of the Election

Another issue on appeal will apparently be the logistical obstacles allegedly attendant to running an election which provides for write-in votes. The affidavits of Dwayne Yoshina and Thomas Yamashiro for defendants, and of Alan Burdick for plaintiff, establish to the court's satisfaction that the election can go forward without the need of reprinting the ballots, and that write-in votes can be registered either by means of directly writing on the ballot, or by using a separate envelope. The most effective means of implementing the system is, of course, left to the sound discretion of the Chief Elections Officer.

Defendants claim that "however precious the right to vote by write-in may be, it cannot be justified at this late date, for this year's election." DM at 28. This court

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[16] At oral argument, defendants suggested that Mr. Yoshina's first affidavit must be liberally construed at the summary judgment stage. They did not indicate, however, the manner in which the court allegedly construed the affidavit too narrowly. Furthermore, Mr. Yoshina's inadmissible speculation as to the delay likely to occur could have been disregarded by this court pursuant to Rule 56(e) of the Federal Rules of Civil Procedure. However, in an effort to give the defendants every benefit, this court considered *all* of their arguments.

must, however, repeat its observation that the inconvenience to defendants of providing for such an option does not justify their abrogation of the constitutional rights of potential write-in voters.

As was the case with the pragmatic issues of eligibility, this court's earlier order did not attempt to answer the many practical questions as to administration of the election which are raised by the allowance of write-in voting, nor did the court intend to minimize the seriousness of those questions. However, simply to say that implementation of write-in balloting poses problems, without a reasonable showing that those problems are insoluble, suffers the sheer novelty of the situation to overwhelm what the court has found to be a clear constitutional right of the voters.

Based on the record, it appears to the court that defendants have taken vigorous and effective steps to comply with the court's order, and that such compliance can be effected by the time of the election. Defendants have set all of the concerns voiced by the court in *Wright v. Cripps*, 292 F. Supp. 294 (D. Del. 1968) (three-judge court). The Lieutenant Governor's office will apparently meet the deadline for mailing absentee ballots and the requirements for bilingual instructions. Although it would obviously ease defendants' burden significantly if this court were to remove the write-in requirement, that fact alone does not warrant staying the injunction.

E. Legislative Action

Defendants concede that one of their points of appeal is "entirely divorced from the merits." DM at 28. This argument, that the legislature (which is currently in recess) should be allowed to resolve or to clarify many of the legal questions presented by this action, was not even hinted at in the prior hearing. Defendants suggest, however, that it implicates the federalism concerns raised by a "federal court's refusal to allow a state legislature a reasonable opportunity to devise a system of voting" to meet federal constitutional requirements.

Defendants concede that they are not making an argument for federal abstention. In any event, principles of federalism implicit in the abstention doctrine may be outweighed in an individual case by the "countervailing interest in ensuring each citizen's federal right to vote." *Badham v. U.S. Dist. Ct. for N.D. of Cal.*, 721 F.2d 1170, 1173 (9th Cir. 1983), *cert. denied*, 105 S.Ct. 1844 (1985).

The problem with defendants' argument is that it ignores the arguable inference that the legislature has, by its silence, already allowed for write-in votes. The decision banning write-in voting was made by the Chief Elections Officer (on advice of the Attorney General), and not by the legislature. Moreover, that official is charged with the administration of the elections and he consequently has within his own power the means to implement a system of providing for write-in voting. In fact, he was offered the opportunity to do so, without court intervention, by plaintiff's June 3, 1986 inquiry. His failure to comply with plaintiff's request necessitated the filing of this action.

Principles of comity and federalism do not dictate that this court refrain from righting a constitutional wrong in the hope that the legislature will eventually see its way clear to implementing regulations which will cure the defect perceived by the court. The issue is not simply whether a federal court can or should interfere with the administration of a state election, but rather whether a federal court can enjoin unconstitutional practices by state officials. Clearly, the answer must be in the affirmative; otherwise, federal courts would routinely be compelled to abstain from adjudicating actions brought pursuant to 42 U.S.C. § 1983, in order to permit the affected State legislature to act.

F. The Laches Defense

Defendants conclude their points on appeal with the argument that this particular plaintiff should not be allowed to obtain statewide relief because he has attempted to "sandbag the State's four-year general election and the entire statutory scheme underpinning it with a massive injunctive ambush." DM at 30. Defendants do not present any evidence that plaintiff intended such a result or that the court has effected it.

Furthermore, aside from the fact that it does not appear that plaintiff would gain anything from the bad-faith attack which defendants suggest he has mounted, the court notes that the argument that plaintiff acted dilatorily in this instance or followed other than a reasonable course in attempting to vindicate his First Amendment rights is completely unsupported by the record.

When plaintiff first brought this issue to defendants' attention, more than four months ago, he provided them with a detailed explanation, including cast authority, for his belief that a write-in opportunity was constitutionally necessary. Defendants eventually responded that they recognized "the seriousness of [his] question." June 24, 1986 letter from Gerard Jervis. Approximately five weeks after the initial contact, plaintiff learned that the Attorney General's office was of the opinion that

> none of the federal cases seems to require the conclusion which Mr. Burdick urges, and the California and Georgia opinions themselves are of no precedental effect in Hawaii. We are, therefore, not persuaded that the Legislature, or the Lieutenant Governor, as the State's chief election officer, must enact laws or adopt rules which would allow write-in voting.

July 11, 1986 letter from Charleen Aina.

This letter opinion not only admits that Hawaii has made no provision for write-in voting, but also concludes that neither the legislature nor defendant Waihee had any affirmative obligation to do so. Nowhere in the correspondence from defendants is there the remotest suggestion, as defendants now claim, that they have consistently relied on the *Jensen* case for the authority that write-in voting in Hawaii had been prohibited for thirty years.[17]

The Chief Elections Officer, as implicitly conceded by the above quotation, has always had the power to moot this question by acceding to plaintiff's request. Consequently, not until defendants responded in the negative to plaintiff's questions was he aware that write-in voting would not be allowed in the 1986 elections.

Even then, this cast was not ripe; plaintiff could not know that he even wished to challenge the defendants' decision until he knew whether he actually wanted or needed to cast a write-in vote. He could not reach that conclusion, in turn, until he was acquainted with the total pool of candidates who, under defendants' rules, would possibly appear on the ballot eventually. That time arrived when the deadline for filing statements of candidacy passed on July 22, 1986. This suit was filed in early August, in a prompt and timely fashion.[18]

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[17] Defendants did not, of course, alert plaintiff to the existence of *Jensen* until four days before the date of the hearing on the motion to stay. They now raise the new argument, however, that plaintiff, a practicing attorney, should be deemed to have had constructive knowledge of the *Jensen* opinion, so that he should have perceived the need to seek earlier relief in the courts.

[18] Although not dispositive of the laches question, the court notes that defendants had the ability to avoid the prejudice allegedly resulting from the late date of the court's order. As soon as they learned of plaintiff's position, in early June, they could have (a) made provision for write-in votes while reserving their right to contest the same, and

(continued...)

Defendants complain, however, that this court improperly granted summary judgment by filling gaps in the record adversely to defendants, and hence contrary to Rule 56 of the Federal Rules of Civil Procedure. Defendants do not point to any particular gaps which were allegedly filled; certainly they did not draw the court's attention to any factual issues at the time of the earlier hearing.

Defendants argue that the court resolved the question of plaintiff's good faith in his favor "without a single word of testimony." DM at 30. This is not true. Not only did Mr. Burdick address the court, albeit briefly, at the hearing, but he also submitted an affidavit in support of the motion. This court properly considered both sources of testimony. In any event, this argument is irrelevant. Laches is an affirmative defense, and defendants have the burden of showing that plaintiff did *not* act in good faith. This court found that defendants had completely failed to meet their burden.

Defendants not only failed to meet their burden of persuasion (a fact not relevant to a motion for summary judgment), they also failed to meet the burden of production. It was this latter omission which governed the court's ruling on the laches issue.[19] Despite defendants'

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[18] (...continued)
(b) filed a declaratory judgment action. If the issue was resolved in their favor, they could have notified voters that the write-in spaces were invalid; if not, they would have been prepared to accommodate write-in votes.

[19] Although it is true that this court did not explicitly set forth the standard governing motions for summary judgment in its previous order, Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact
>
> (continued...)

repeated assertions that they were entitled to the benefit of all reasonable inferences as the opponent of the motion, the bare claim that plaintiff could have filed suit earlier, even if true, does not establish a genuine issue of material fact.

Defendants rely on *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio*, ___ U.S. ___, 106 S.Ct. 1348 (1986), to argue that the court misapplied the standard to be used in considering summary judgment even when the facts are undisputed. In pertinent part, *Liberty* Lobby holds only that

> [t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

106 S.Ct. at 2511. *Matsushita* similarly holds that where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." 106 S.Ct. 1356 (citation omitted).

Defendants claim that the court resolved issues adversely to them without identifying those issues. They add the argument that plaintiff was allegedly on con-

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[19] (...continued)
> and that the moving party is entitled to a judgment as a matter of law.

The moving party has the burden of demonstrating the absence of a genuine issue of fact. *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). The evidence must be viewed in the light most favorable to the opposing party on all factual issues. *Beltz Travel Service v. International Air Transport Ass'n*, 620 F.2d 1360, 1364 (9th Cir. 1980).

structive notice of the *Jensen* opinion even before they explicitly brought it to his attention. The applicable standard, however, is whether plaintiff has *inexcusably delayed* in pressing his rights. *Knox v. Milwaukee County Board of Elections Commissioners*, 581 F. Supp. 399, 402-03 (E.D. Wis. 1984). Defendants have failed to show that plaintiff delayed at all, let alone that such delay was inexcusable.

Defendants must also show that the delay prejudiced them. *Id.* This court has already found that plaintiff's conduct did not result in undue prejudice. Furthermore, when they learned of plaintiff's concern in early June, his delay in bringing suit did not preclude them from securing declaratory relief and/or from making contingency plans in the event that plaintiff ultimately prevailed. Any prejudice was accordingly self-inflicted.

VI. Conclusion

After a review of the points which defendants intend to press on appeal, this court is not persuaded that a stay of its injunction pending appeal is appropriate in this case. Even if granting a stay of the court's September 29, 1986 order would not moot the appeal, the court does not believe that defendants have made a substantial showing as to any of the four prongs of the *Turner* test for Rule 62(c) motions.

The root of the problem in this case is that defendants, unlike the State in *Unity Party, supra*, at 62, have in this case "erect[ed] some sort of ponderous portcullis barring [voter] access to the ballot [which] triggers heightened scrutiny to justify it." The flat prohibition on write-in voting materially impairs the right of Hawaii voters to participate in the general election process, and the excuses proposed by defendants do not adequately serve to validate the restriction.

As the Supreme Court has commented in another context, "The right to vote freely for the candidate of

one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964). This court believes that the November 4, 1986 election must include provision for write-in voting for those individuals who wish to exercise such an option.

Accordingly, defendants having failed to persuade the court that a stay of its injunction pending appeal is warranted, IT IS HEREBY ORDERED that the motion for stay, suspension, or modification of injunction be, and the same is, DENIED.

DATED: Honolulu, Hawaii, OCT 8 1986

s/s
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (all defendants in the above-titled action), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Denying Motion for Stay, Suspension, or Modification of Injunction" entered in this action on the eighth day of October, 1986, and from all previous orders and judgments in this action, particularly the "Order Granting Motion for Summary Judgment And for Permanent Injunction" entered in this action on the twenty-ninth day of September, 1986, and from the "Judgment in a Civil Case" entered in this action on the thirtieth day of September, 1986.

DATED: Honolulu, Hawaii, October 8, 1986.

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

/s/
CHARLEEN M. AINA
LAWRENCE L. HINES
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK, *Plaintiff-Appellee,* vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii, et al. *Defendants-Appellants.*	)	Nos. 86-2689 86-2703 DC# C-86-0582 (HMF) Hawaii

ORDER

Before: Hug, Poole, and Norris, Circuit Judges

The appellants' emergency motion for a stay of the district court's injunction pending appeal is granted.

[October 15, 1986]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK, *Plaintiff-Appellee*, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; *Defendants-Appellants*.	)	CA NOS. 86-2689, 86-2703 DC NO. CV-86-582 -HMF

APPEAL from the United States District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of ___Hawaii___ and was duly submitted.

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is vacated and remanded with instructions.

Filed and entered May 17, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK, Plaintiff, v. BENJAMIN CAYETANO in his capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of Elections of the State of Hawaii, Defendants.	)	Civil No. 88-00365

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Alan B. Burdick, through his attorneys Johnston & Day, alleges as follows:

I

JURISDICTION

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1343(3)(4) and 42 U.S.C. 1983.

2. Plaintiff seeks declaratory and injunctive relief pursuant to 28 U.S.C. 2201 and 2202.

II

STATEMENT

1. Plaintiff Alan B. Burdick is a resident of the

City and County of Honolulu and is a registered voter in the City and County of Honolulu, State of Hawaii.

2. Defendant Benjamin Cayetano is a resident of the City and County of Honolulu, State of Hawaii. He is the Lieutenant Governor of the State of Hawaii and the Chief Elections officer pursuant to Hawaii Revised Statutes ("HRS") Section 11-2, and is responsible for the conduct of the elections for State and Federal offices. He is sued in his capacity as Lieutenant Governor.

3. Defendant Morris Takushi is a resident of the City and County of Honolulu, State of Hawaii, and is Director of Elections for the State of Hawaii. He is sued in his capacity as Director of Elections.

4. The Hawaii statutes governing elections, Hawaii Revised Statutes Chapter 11, make no express provision for voters to write in the name of a candidate or in any other way to vote for a candidate whose name is not printed on the ballot. Chapter 11 makes no provision that voters may not write in the names of a candidate or in any other way vote for a candidate whose name is not printed on the ballot.

5. HRS Chapter 11 makes no express provision for the counting of votes for persons whose names have been written in on a ballot or for publishing the results of any write-in votes.

6. In the 1986 election, Plaintiff Alan B. Burdick resided in a State House of Representatives district where only one candidate filed to run for election to the State House of Representatives by the candidate filing deadline. Plaintiff Burdick had no choice of candidate in that race and desired to vote for a person who had not filed nominating papers and whose name was not printed on the ballot for either the primary or general election.

7. In addition thereto, Plaintiff wished to vote for

other persons in other elections, both in the primary and general elections in both State and Federal elections in 1986 and now in 1988, whose names are not or may not be on the election ballot.

8. In 1986, Plaintiff made inquiries both by telephone and by letter to the Lieutenant Governor at the time, the Honorable John Waihee, to determine whether he would be permitted to write in the name of candidates on the ballot. Plaintiff was informed by Mr. Morris Takushi, Director of Elections, that because HRS Chapter 11 makes no explicit provision for a write-in vote, election officials would disregard write-in votes case in the 1986 election or any other election.

9. Plaintiff filed suit in the United States District Court for the District of Hawaii on August 21, 1986 (*Burdick v. Takushi*, Civil No. 86-0582), seeking declaratory and injunctive relief.

10. On September 29, 1986, U.S. District Judge Harold Fong issued an Order Granting Motion for Summary Judgment and for Permanent Injunction. Judge Fong entered an order on October 8, 1986, denying the State's Motion for Stay, Suspension or Modification of Injunction.

11. The State then appealed Judge Fong's orders to the United States Court of Appeals for the Ninth Circuit, obtaining by emergency motion a stay of the District Court's injunction pending the appeal. (Order entered in 86-2689 and 86-2703 on October 15, 1986.)

12. The appeal to the Ninth Circuit Court of Appeals was briefed and then orally argued in August, 1987. To date, no decision on appeal has been rendered by the Ninth Circuit on that case.

13. Although the State appealed the Order Granting Summary Judgment and Injunctive Relief, it obtained no stay of that part of the order granting summary judg-

ment, obtaining only a stay of the injunctive relief which required the State of Hawaii to provide for write-in balloting in the 1986 general election.

14. Thus, to date, the law in Hawaii as decided by this Court in 1986, is that the State must provide for the casting, counting and reporting of write-in votes.

15. Upon taking office in December, 1986, Defendant Benjamin Cayetano made a promise to the people of Hawaii that he would seek enactment of legislation providing for write-in voting.

16. A bill that would provide for a highly circumscribed form of write-in voting was introduced in the 1987 legislative session (S.B. No. 1137). It was not passed. The bill was considered in the 1988 legislative session, but again was not passed.

17. The Hawaii legislature has had two years since the issuance of this Court's decision in *Burdick v. Takushi*, Civil No. 86-0582, to take appropriate steps to provide for write-in voting. It has failed to do so.

18. The 1987 Legislature passed S.B. No. 1146, now codified an Hawaii Revised Statutes, Section 15-3.5, which expressly provides for Federal write-in absentee balloting for overseas voters.

19. Federal law (pursuant to 42 U.S.C. 1973ff.2) provides that an overseas absentee voter has the right to cast a vote by writing in the name of a candidate or political party of his or her choice.

20. If Plaintiff were overseas at the time of the primary or general election, he would be able to cast a write-in vote for the candidate of his choice, pursuant to Federal law. However, if Plaintiff votes in the State of Hawaii in the Federal election, he can vote only for candidates who are listed on the ballot. Thereby he is deprived of the right an overseas absentee voter has to

write in the name of a candidate of his choice.

21. Although the deadlines for candidates to file to run for office have not yet passed, Plaintiff believes he and other voters will certainly be placed in the same position they were in in 1986 -- that is, they will be unable to cast write-in votes in either the primary or general election for either state or federal office.

22. Defendants' failure to provide for write-in voting will continue to deprive Plaintiff and other Hawaii voters of their full voting rights.

23. Plaintiff wrote to the Attorney General's Office in March, 1988, attempting to find out if write-in balloting would be provided for in the 1988 primary and general elections. (A copy of Plaintiff's letter is attached hereto as Exhibit A.)

24. On April 8, 1988, there having been no answer to Plaintiff's letter, Plaintiff's attorney wrote two letters to the Attorney General to find out if write-in balloting would be provided in the 1988 elections and also to inquire whether voting machines that were being inspected by the State for possible purchase had the capability of handling write-in voting. (Copies of these letters are attached hereto as Exhibits B and C.)

25. On April 28, 1988, Defendant Cayetano responded to these inquiries. His answer was that the State will not be providing Plaintiff or any other Hawaii voter with the opportunity to case write-in votes. (A copy of Defendant Cayetano's letter is attached hereto as Exhibit D.)

26. Defendants' denial of Plaintiff's right to vote for the person of his choice by casting a write-in ballot constitutes violations of the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States cf America, as well as violations of Article I, Sections 1, 2, 4, 6 and 20.

27. Defendants' denial of Plaintiff's right to cast a write-in ballot in Federal elections unless he is overseas is a denial of right to the equal protection of the laws as guaranteed by the 14th Amendment.

28. The denial of Plaintiff's constitutional rights constitutes a violation of 42 U.S.C. 1983.

29. Defendants' refusal to permit the casting and counting of write-in votes is unauthorized by statute and constitutes conduct ultra vires of their authority under the Constitution and laws of the United States of America and the State of Hawaii.

30. Defendants' refusal to permit the casting and counting of write-in votes constitutes an abuse of their discretionary authority.

III

CLAIMS FOR RELIEF

Wherefore, Plaintiff prays for relief as follows:

1. That this Court declare that a prohibition on write-in votes on election ballots for the 1988 primary and general elections is unconstitutional;

2. That this Court require Defendants to

   a) provide a space on the ballots for write-in votes;

   b) count write-in votes;

   c) publish the results of write-in votes;

   d) instruct election workers to advise voters that they can write in votes and inform the voters that write-in voting is permitted.

3. That this Court award Plaintiff costs of suit and attorneys' fees pursuant to 42 U.S.C. 1988.

4. That this Court grant Plaintiff such other and

further relief as this Court deems just.

DATED: Honolulu, Hawaii, May 17, 1988.

s/s
MARY BLAINE JOHNSTON
Attorney for Plaintiff

s/s
ALAN B. BURDICK
Plaintiff Pro Se

s/s
KIRK CASHMERE
American Civil Liberties Union
Foundation of Hawaii
Attorney for Plaintiff

[Letterhead -- Alan B. Burdick]

February 24, 1988

Steven S. Michaels, Esq.
Deputy Attorney General
Room 405, State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: *Burdick v. Takushi*
Write-In Voting Lawsuit

Dear Mr. Michaels:

As I am sure you are aware, Judge Fong's decision declaring that voters have the constitutional right to cast write-in votes remains the law of the land in the State of Hawaii.

This letter is to request that you assure me, at the earliest possible time, that the State's election officials are taking in a timely manner all steps necessary to ensure that all voters in the State will be able to cast write-in votes in both the September primary and the November general election. I trust that, with nearly two years to do the proper planning, the election officials have devised a procedure that will be simple, easy to use by voters, protective of secrecy, and compatible with vote-counting procedures, so that there will be no delays in reporting the votes cast for listed candidates.

Thank you very much for your cooperation in this matter.

Sincerely yours,

s/s

Alan B. Burdick

ABB/mm
cc: Attorney General Warren Price, III
Kirk Cashmere, Esq., ACLU
Mary Blaine Johnston, Esq.

Exhibit A

[Letterhead -- Johnston & Day]

April 8, 1988

Steven Michaels
Deputy Attorney General
Room 405, State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: *Burdick v. Takushi*,
Write-In Voting Lawsuit

Dear Mr. Michaels:

I have received a copy of a letter to you from Alan Burdick dated February 24, 1988, requesting that you insure him in writing that the State is taking steps to make write-in votes available for both the September primary and November general election, 1988. It is my understanding from Mr. Burdick that he has received no response to his letter.

As attorney for Mr. Burdick in the *Burdick v. Takushi* lawsuit, I am hereby requesting that you advise me in writing no later than Monday, April 18, 1988, that the State will be providing for write in balloting in both the September primary and the November general election. If I have not had confirmation that the State is taking such steps to comply with the judgment rendered by Judge Fong in 1986, I will have no choice but to file a new lawsuit asking that the Federal Court rule that the State must provide for write-in balloting in both the September and November elections. It is unfortunate that the Ninth Circuit has not yet rendered its decision, but until it does, Judge Fong's ruling remains the law.

Sincerely yours,

/s/

Mary Blaine Johnston

CC: Alan S. Burdick, Kirk Cashmere, Esq.
American Civil Liberties Union

Exhibit B

[Letterhead -- Johnston & Day]

April 8, 1988

Steven Michaels
Deputy Attorney General
Room 405
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Selection of New Voting Equipment

Dear Mr. Michaels:

I have read in the paper that Lieutenant Governor Benjamin Cayetano is presently in the process of looking at a variety of voting machines with an eye toward the State's purchasing them for use in future elections. By way of this letter I am putting the State on notice that it is expected that any voting machines that are considered for purchase for use in the elections in Hawaii have the ability to handle write-in votes. As you are well aware, Judge Fong's decision in 1986 that the State must provide for write-in voting remains the law in this State and I anticipate that the Ninth Circuit Court of Appeal's is going to uphold this decision when it renders its decision on the appeal. We therefore urge the Lieutenant Governor to make sure that any machine he recommends for purchase be able to comply with the law.

Sincerely yours,

/s/

Mary Blaine Johnston

CC: Alan B. Burdick
Kirk Cashmere

Exhibit C

[Letterhead -- Office of the Lieutenant Governor]

Ref. 884932

April 25, 1988

Mary Blaine Johnston, Esq.
Johnston & Day
Second Floor
222 Merchant Street
Honolulu, Hawaii 96813

Burdick v. Takushi, No. 86-2689 & 86-2703 (9th Cir. argued Aug. 13, 1987) (constitutionality of Hawaii's prohibition on the counting of write-in votes at the primary and general elections)

Dear Ms. Johnston:

This letter responds to Mr. Alan Burdick's letter of February 24, 1988, and your two letters of April 8, 1988, which have been referred to the Office of the Lieutenant Governor by the Department of the Attorney General, State of Hawaii.

As you know, this issue is presently in litigation following the State's appeal of Chief Judge Fong's orders of September 29, and October 8, 1986, and the stay of those orders entered by the United States Court of Appeals on October 15, 1986.

We have been advised by the Attorney General that, in its present procedural posture, all injunctive orders emanating from the federal court proceedings have been stayed and we may reasonably rely on the Ninth Circuit's order of October 15, 1986, as alternatively staying any injunctive order respecting the 1988 elections as may have been within the scope of Chief Judge Fong's 1986 decisions, or indicating that the Court of Appeals would

stay any new injunction that Chief Judge Fong might choose to enter pending a decision on the instant appeals. The Department of the Attorney General has also advised us that in light of intervening precedent it is much more than likely that any dissolution of the stay presently in effect, or refusal to stay any new injunctive order, would be reversed.

You may be aware that, in 1987, legislation was submitted at my request in the State Legislature that would have provided authority for the counting of write-in votes under prescribed circumstances in the primary and special primary elections. I believe now, as I did when the legislation was submitted, that, as a matter of policy, and subject to reasonable restrictions, write-in voting would make the primary and special primary elections more open to participation by the voters, and that this would be beneficial to our political process in Hawaii. To my regret, the bill failed to emerge from committee in the House of Representatives and thus will not become law in this session.

Although, as a matter of policy, the Office of the Lieutenant Governor shares in part Mr. Burdick's interest in establishing write-in voting as an option in Hawaii, we respectfully disagree with the conclusion that, despite our present avenues by which citizens may express their choices, the United States Constitution compels Hawaii to adopt write-in voting. As Lieutenant Governor, it is my duty to see that our election laws are faithfully carried out. Under our understanding of the election statutes, which draws upon the Supreme Court of Hawaii's decision in *Tenson v. Turner*, 40 Haw. 604 (1954), the Office of the Lieutenant Governor presently has no authority to count or consider write-in votes cast in Hawaii elections.

We are aware of, and concur in, the Attorney General's arguments to the federal courts that it is open to the courts of Hawaii to overrule the *Jenson* case on the

basis of state law, and that, in advance of a dispositive ruling on these issues by our state courts, it is inappropriate for the federal courts to enter the fray. However, until advised otherwise by our state courts, we must assume that *Jenson* is good law, and that the statutory ban on write-in voting, as described by the *Jenson* decision, continues as part of the state election law.

Accordingly, while we understand that Chief Judge Fong's declaratory rulings have not been reversed, in light of the present procedural posture of the federal litigation, absent further instruction from the courts, write-in votes will not be counted or considered in the 1988 elections. We continue to believe that the orders of the District Court will ultimately be reversed, and, because of the intrusive effects of any federal injunction mandating write-in voting in Hawaii, we will respectfully oppose any attempts to lift the Ninth Circuit's stay or to move for a new injunction before the Federal Courts.

Despite our differences with your client's positions, I wish to stress our continuing desire to work with you for legislative change in this area. Of course, in the event that a court would enjoin us to provide write-in voting, the Office of the Lieutenant Governor will take appropriate steps to comply until that order is reversed, vacated, or stayed.

Sincerely,

/s/
Benjaman J. Cayetano
Lieutenant Governor

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF.

Come now Defendants Benjamin Cayetano, named in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, named in his capacity as Director of Elections, and answer and plead as follows in response to the Complaint for Declaratory and Injunctive Relief filed on May 17, 1988.

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. The complaint was not served in conformity with Rule 4(c), and 4(d)(6), of the Federal Rules of Civil Procedure.

THIRD DEFENSE

3. The claims stated in the complaint may not be the source of relief in this Court because of the Eleventh Amendment.

FOURTH DEFENSE

4. This Court otherwise lacks subject matter jurisdiction over the claims pleaded in the complaint.

FIFTH DEFENSE

5. The claims stated in the complaint are barred or premature by virtue of the res judicata, collateral estoppel, or law of the case effects of the judgment of the United States Court of Appeals for the Ninth Circuit in

Burdick v. Takushi, appeal Nos. 86-2689 & 86-2703, copy attached as Exhibit "A."

SIXTH DEFENSE

6. The Court should dismiss or abstain in this proceeding pending the resolution of the questions of state law identified by the Court of Appeals in *Burdick v. Takushi*, *supra*.

SEVENTH DEFENSE

7. The Court should otherwise dismiss or abstain for reasons of comity, federalism, restraint, or wise judicial administration.

EIGHTH DEFENSE

8. The complaint fails to name parties required to be named under Rule 19, Fed. R. Civ. P.

NINTH DEFENSE

9. Plaintiff has not shown his entitlement to equitable relief, e.g., plaintiff has failed to act with diligence within the Hawaii election system, has failed to act as a reasonable participant in the election system, has unduly delayed in bringing this action, is barred by the doctrine of laches, or is otherwise unable to demonstrate that he has no other adequate remedy and is entitled to equitable relief from this Court.

TENTH DEFENSE

10. To the extent any relief is sought against defendants in their individual capacities, such relief is barred by the doctrines of absolute, or, alternatively, qualified immunity.

ELEVENTH DEFENSE

11. Plaintiff's claims are barred by the failure to pursue adequate remedies under the Hawaii Administrative Procedure Act, and in the courts of the

State of Hawaii."

TWELFTH DEFENSE

12. Plaintiff's prayer for relief is overbroad.

THIRTEENTH DEFENSE

13. Plaintiff's claims are barred by the Tenth Amendment.

FOURTEEN DEFENSE

14. Defendants admit the allegations of paragraphs 9, 10, and 11 of the complaint.

15. Defendants deny the allegations of paragraphs 13, 14, 22, 26, 27, 28, 29, and 30 of the complaint.

16. Defendants are without information sufficient to form a belief as to truth or falsity of the allegations of paragraphs 1, 6, and 7 of the complaint.

17. With respect to paragraph 2 of the complaint, defendants admit that Benjamin Cayetano is a resident of the City and County of Honolulu, State of Hawaii, and that he is Lieutenant Governor of the State of Hawaii and the Chief Elections Officer pursuant to S 11-2, Haw. Rev. Stat. (1985). Defendants are unable to respond to the allegation that the Lieutenant Governor is "responsible for the conduct of the elections for State and Federal office" because that phrase is vague and ambiguous, and therefore deny the same. The responsibilities of state and county officials in connection with the administration of elections in the State of Hawaii is set forth in applicable statutes, rules, and administrative delegations of authority.

18. With respect to the allegations of paragraph 3 of the complaint, Defendants admit that Morris Takukshi is a resident of the City and County of Honolulu, State of Hawaii, and is Director of Elections for the State of Hawaii.

19. Defendants deny the specific allegations of paragraphs 4, 5 and 21 of the complaint but qualify that answer as follows. Defendants believe that, reasonably construed, the Hawaii election laws, as a whole, do not authorize or require the counting, consideration, or publication of so-called "write-in" votes. Defendants base this view upon, among other grounds, statements made in *Jenson v. Turner*, 40 Haw. 604 (1954), the text and purpose of the election statutes, lack of standards for counting, consideration, or publication of write-in votes, the availability of other opportunities for participation, and other factors and materials that properly inform interpretation of the statutes. Defendants nonetheless admit and assert that the United States Court of Appeals in *Burdick v. Takushi*, *supra*, properly held that, under the circumstances, the *Pullman* abstention doctrine, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), bars a federal court from entering equitable relief of the sort sought by plaintiff until the courts of Hawaii have been allowed by a proper case to give a contemporary construction to state law bearing on plaintiff's claims.

20. Defendants are without information sufficient to form a belief with respect to the truth of the precise allegations set forth in paragraph 8 and deny the same for this reason. Defendants admit that, on about June 6, 1986, plaintiff wrote a letter to Gerald Jervis, Esq., Director of Research, Office of the Lieutenant Governor, and that the letter speaks for itself. Defendants assert, further, without waiving any argument, claim, or contention with respect thereto, that Mr. Gerald Jervis mailed to plaintiff a written response on about June 24, 1986, and a further written response, including an opinion letter from Deputy Attorney General Charleen M. Aina, on about July 11, 1986.

21. With respect to paragraph 12, Defendants deny the allegations concerning the appeal in *Burdick v.*

Takushi, insofar as the Court of Appeals decided the case before this case was filed.

22. With respect to paragraph 15, Defendants are unable to respond to the allegation that "Defendant Benjamin Cayetano made a promise to the people of Hawaii that he would seek enactment of legislation providing for write-in voting" because the allegation is legally vague and ambiguous, and thus deny the same. Defendants admit and assert that, as a policy matter, the present Lieutenant Governor has supported state legislation that would, if enacted, permit the counting, consideration, and publication of write-in votes subject to appropriate standards and regulations at the primary and special primary elections.

23. With respect to paragraph 16, Defendants admit that S.B. No. 1137-87 was submitted by the request of the Lieutenant Governor, passed third reading in the State of Hawaii Senate on March 13, 1987, and passed second reading in the State of Hawaii House of Representatives on March 27, 1987, and was thereupon referred to the State of Hawaii House of Representatives Standing Committee on Finance, on March 31, 1987. Defendants also admit that, according to the records presently available, no further action was taken by the Legislature and S.B. 1137-87 did not pass. Defendants also admit that it was not legally necessary for S.B. 1137-87 to be reintroduced in the 1988 legislative session and the Legislature could have passed the bill without a new bill being introduced in both Houses. In all other respects, Defendants deny the allegations of paragraph 16 of the complaint.

24. With respect to the allegations of paragraph 17 of the complaint, Defendants deny that the Legislature, as a matter of federal or state law, has ever failed "to take appropriate steps to provide for write-in voting." Whether write-in voting is addressed by specific legislation or by an interpretation of state law is a matter sole-

ly within the competence and discretion of the state legislature, subject to the Governor's veto, and in the courts of the State of Hawaii, subject to checks on those courts provided by the Constitution of the State of Hawaii.

25. With respect to the allegations of paragraphs 18, 19 and 20, Defendants admit that in 1987 the legislature of the State of Hawaii granted authority, now codified at Haw. Rev. Stat. § 15-3.5 (Supp. 1987), that authorizes the Lieutenant Governor to comply with the federal Overseas Voting Rights Act, 42 U.S.C. § 1973ff (West Supp. 1988), but Defendants deny that the federal act or § 15-3.5 require the State to provide voters who are subject to the protections of those laws the right to cast a write-in vote as the term is used by the plaintiff here.

26. With respect to the allegations of paragraph 23, 24, and 25, of the complaint, Defendants admit that on about February 24, 1988, plaintiff wrote to the Department of the Attorney General, and that plaintiff's letter, attached to the complaint as Exhibit "A" speaks for itself, that plaintiff was provided with an interim oral response in early March, 1988, by the Department of the Attorney General, and was provided with a second interim response, in writing, by the Department of the Attorney General on April 11, 1988. A true copy of the April 11, 1988, written response, is attached as Exhibit "B." A true copy of the plaintiff's counsel's response thereto is attached as Exhibit "C." The Defendants also admit that, on April 25, 1988, the Lieutenant Governor timely responded to letters written by and on behalf of the plaintiff on February 24, 1988, and on April 8, 1988, and this response, Exhibit D to the complaint, speaks for itself. Defendants otherwise deny the allegations of paragraphs 23, 24, and 25 of the complaint.

27. Defendants deny each and every allegation of the complaint that is not admitted expressly by this Answer.

28. With respect to the complaint as a whole, defendants assert that, in light of the Ninth Circuit's disposition in *Burdick v. Takushi*, *supra*, prosecution of the instant complaint would violate Rule 11, Fed. R. Civ. P., and establishes a basis for sanctions against plaintiff under 28 U.S.C. § 1927, and 42 U.S.C. § 1988, and that Defendants are entitled to their "just costs" under 28 U.S.C. § 1919.

WHEREFORE, Defendants pray for relief as follows:

1. That this Court dismiss the complaint for want of jurisdiction, or abstain from exercising its jurisdiction, and that Defendants be granted their costs, expenses, and attorneys fees.

2. That, in the alternative, the Court should promptly certify applicable questions of state law to the Supreme Court of Hawaii pursuant to Haw. R. App. P. 13, and that Defendants be granted their costs, expenses, and attorneys fees in obtaining this order.

3. That, should the court reach the merits of plaintiff's claims, that each and every one of those claims be dismissed with prejudice, and that Defendants be granted their costs, expenses, and attorneys fees.

4. That this Court grant Defendants such other and further relief as this Court deems just and is authorized by law.

Dated: Honolulu, Hawaii, June 7, 1988.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
STEVEN S. MICHAELS
Deputy Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK, *Plaintiff*, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; *Defendants*.	)	Civil No. 86 0582

ORDER CERTIFYING QUESTIONS OF HAWAII LAW TO THE SUPREME COURT OF THE STATE OF HAWAII

The parties to this case have submitted a stipulation requesting the United States District Court for the District of Hawaii to certify certain questions to the Supreme Court of the State of Hawaii. The court finds good cause to certify these questions and being fully informed of the premises therefor.

IT IS HEREBY ORDERED that the Clerk of the United States District Court for the District of Hawaii shall forthwith cause the filing of the appropriate certificate, a copy of which is attached hereto as Exhibit 1, submitting the following questions to the Supreme Court of the State of Hawaii;

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election offi-

cials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

DATED: Honolulu, Hawaii, JUL 19 1988

s/s
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT
OF THE STATE OF HAWAII

ALAN B. BURDICK, *Plaintiff*, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; *Defendants*.	)	NO. (USDC NO. 86 0582 HMF)

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII TO THE SUPREME COURT OF THE STATE OF HAWAII

I. INTRODUCTION

The United States District Court for the District of Hawaii has before it in the case entitled *Burdick v. Takushi, et al.*, Civil No. 86-O582, questions regarding the Constitution and election laws of the State of Hawaii that are determinative of the action, and for which there is no clear controlling precedent in the decisions of the courts of the State of Hawaii. Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court answer the questions as set forth in Part III of this certification by written opinion.

II. STATEMENT OF PRIOR PROCEEDINGS AND STATEMENT OF FACTS

In May 1986 plaintiff Burdick notified defendants

Takushi and Waihee that he wished to cast one or more write-in votes in the September 1986 primary election and in future elections. After consulting with the State Attorney General, defendants informed Burdick that Hawaii election laws do not provide for write-ins and that such votes would be disallowed or ignored.

Burdick filed suit in federal district court claiming that in the upcoming primary and in future primaries and general elections he wished to vote for persons whose names would not appear on the printed ballot and that a ban on such write-in voting violates both the Hawaii Constitution and the United States Constitution. The district court agreed, granting summary judgment for Burdick on the federal constitutional issue. The district court issued an injunction ordering the defendants to provide for write-in voting in the 1986 general election.

The defendants appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The defendants obtained a stay pending appeal.

The appeal was argued before the court of appeals on August 13, 1986. On May 17, 1988, the court entered its opinion vacating the district court's judgment. The court of appeals remanded the case to the district court with instructions to the district court to abstain from deciding the federal constitutional issue pending a determination by the courts of the State of Hawaii whether Hawaii's law permits or requires write-in voting.

If the Hawaii Supreme Court rules that Hawaii law requires write-in voting, there will be no need to decide the federal constitutional question raised in plaintiff's complaint. Similarly, if the Hawaii Supreme Court rules that Hawaii law permits write-in voting, and if State election officials then provide for such voting, there will be no need to decide the federal constitutional question.

Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determination. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

III. CERTIFIED QUESTIONS

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

IV. CONCLUSION

Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court consider the above questions of Hawaii law and, if appropriate, answer the same by written opinion.

DATED: Honolulu, Hawaii, JUL 19 1988

s/s
UNITED STATES DISTRICT JUDGE

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK, *Plaintiff*, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; *Defendants*.	)	Civil No. 86-0582

ORDER DENYING MOTION FOR AMENDMENT OF CERTIFICATION ORDER

On July 6, 1988 the parties requested that this court certify certain questions to the Supreme Court of the State of Hawaii. The court did so on July 19, 1988.

Along with their request for certification, the parties submitted a proposed certification for the court's consideration. The court declined to sign the proposed certification and instead issued its own certification. Although the court's certification departs from the parties' proposal in several respects, the questions certified are identical.

On August 1, 1988 the defendants filed a motion for amendment of the court's July 19, 1988 certification order. Defendants advance three reasons why the court should amend its certification. First, defendants argue that they obtained certain rights from plaintiff in exchange for their agreement to seek certification. These

rights are incorporated in the parties' proposed certification and the court, by issuing its own certification, deprived defendants of these rights.

Second, defendants argue that the court's certification departs from the court of appeals mandate. Specifically, defendants contend that this court may not advise the Hawaii supreme Court that, absent a change in federal law, the court will rule consistently on the federal constitutional question, if and when that issue comes before it for decision.

Third, defendants argue that the certification should be amended to assure each party an adequate opportunity to be heard in any federal proceeding that might occur after the Hawaii Supreme Court renders its decision.

DISCUSSION

Rule 13 of the Hawaii Rules of Appellate Procedure provides in part as follows:

> When a federal district or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by written opinion.

Defendants first argue that the proposed certification incorporates an implied waiver of plaintiff's right to contest an administrative determination not to provide write-in voting. The court's failure to submit the proposed certification unchanged therefore deprives defendants of this alleged waiver. Defendants argue that the court should not have submitted its own certification, at least not without notice and a hearing.

The court finds defendants' position to be untenable for several reasons. First, there is no evidence, aside from defendants' expansive interpretation of the proposed certification, that plaintiff actually intended to waive his right to challenge an adverse administrative decision, should such a decision become the basis for defendants' continued refusal to allow write-in voting. If plaintiff wished to waive this right, the parties should have clearly said so in their stipulation.

Second, if the parties intended to memorialize an agreement waiving plaintiff's rights in this federal lawsuit, they should not have done so by implication. Nor should they have done so in a proposed certification to be filed with the Hawaii Supreme Court. The court should not find an implied waiver of a federal claim tucked between the lines of a document intended to be filed with another court.

Third, defendants' contention that the waiver is necessary in order for the third certified question to be "determinative of the cause" is disingenuous at best. None of the three certified questions is, *by itself*, determinative, either in the parties' proposed certification or in the court's version. The determinative question before the Hawaii Supreme Court is whether Hawaii law prohibits, permits or compels defendants to provide for write-in voting. Although this could have been phrased as a single question, the parties (including defendants) chose to present it as three "yes or no" sub-questions. These three questions are merely parts of the larger determinative question that the court has certified.

Defendants' indignation over the court's decision to issue its own certification indicates that they misunderstand the certification process. Rule 13(a) does not confer any right upon parties to a federal lawsuit. That rule instead gives this court the right to communicate with the Hawaii Supreme Court. The court is therefore free to phrase a certification in whatever manner it decides

will provide the Hawaii Supreme Court with the best explanation of the issues involved. There is no precedent for the proposition that the parties may dictate the contents of that communication to a federal court.

Because certification is a right of the court, not of the parties, defendants are not entitled to notice and a hearing before the court issues its own certification, instead of that proposed by the parties. Defendants' citation to *Growney Equipment* on this issue is inappropriate. In that case, the district court imposed Rule 11 sanctions without notice or an opportunity to be heard. The court of appeals reversed, holding that due process protections were required before any governmental deprivation of a property interest. *Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc.*, 834 F.2d 833, 835 (9th Cir. 1987). Defendants in this case have no property interest in the contents of this court's communication with the Hawaii Supreme Court.

Defendants next argue that the court should amend its certification because it allegedly departs from the court of appeals mandate. Defendants object to the following portion of the court's certification:

> Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determination. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

Defendants argue that this language prejudices their rights under the court of appeals mandate. Although defendants are not clear on this point, they apparently argue that they are entitled to a de novo consideration of the federal constitutional question. Defendants cite *Johnson v. Board of Education*, 457 U.S. 52, 102 S.Ct.

2223 (1982), in support of this claim. That case, however, stands for the proposition that, when an appellate court vacates and remands a case, the lower court *may* depart from its previous ruling if it wishes to do so. *Johnson*, 457 U.S. at 53-54, 102 S.Ct. at 2224 (when case is vacated, "doctrine of law of the case does not constrain" the district court). Therefore, neither *Johnson* nor the court of appeals mandate *requires* this court to offer defendants a second opportunity to argue the federal constitutional question in this action.

Defendants finally argue that the court should amend its certification to assure them an adequate opportunity to be heard in any federal proceeding that might occur after the Hawaii Supreme Court renders its decision. This argument effectively duplicates defendants' previous contention that they are entitled to a second opportunity to convince the court of the merits of their position on the federal constitutional issue.

Although defendants are not entitled as a matter of right to such an opportunity, the court is concerned that the Hawaii Supreme Court may regard the above-quoted language as an attempt by this court to influence its resolution of the certified questions. For this reason, the court will amend its certification order to delete the second full paragraph on page three and will replace it with the following:

> For the foregoing reasons the above issues of Hawaii law are determinative of the cause within the meaning of Haw. R. App. P. 13. Should the Hawaii Supreme Court answer any or all of the certified questions, any party may transmit the same forthwith to this court and may initiate such further proceedings as are consistent with the Hawaii Supreme Court's decision and with the court of appeals mandate.

In addition, the court will make a series of technical changes in the certification order in order to make clear that this court retains jurisdiction over the federal constitutional question.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, AUG 25 1988

s/s
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 88-0365-ACK
	)	
BENJAMIN CAYETANO, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER CONSOLIDATING CASES

After reviewing the file herein and the file in *Burdick v. Takushi*, Civil No. 86-0582-HMF, which is a substantially earlier case, this court concludes that the two cases should be consolidated pursuant to L.R. 206-1. Therefore, the above-entitled case is hereby reassigned to Judge Fong and to Magistrate Tokairin. The case number shall hereafter bear the suffix "HMF."

IT IS FURTHER ORDERED that the parties are to file a status report notifying Magistrate Tokairin within ten (10) days of a disposition of the certified questions by the Supreme Court of Hawaii.

DATED: Honolulu, Hawaii, Nov 21 1988

/s/
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Captions Omitted In Printing]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF

Plaintiff Alan B. Burdick, through his attorney Mary Blaine Johnston, moves this court pursuant to Rules 56, 57 and 65(a) of the Federal Rules of Civil Procedure, for Summary Judgment in his favor on the Complaint and for a Permanent Injunction as set forth in the proposed order attached hereto.

The Motion is based on the Memorandum of Law and Exhibits attached hereto and the pleadings and files herein.

DATED: Wailuku, Maui, Hawaii, February 8, 1990

/s/
MARY BLAINE JOHNSTON
ALAN B. BURDICK
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Captions Omitted In Printing]

AFFIDAVIT OF ALAN B. BURDICK

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ALAN B. BURDICK, being first duly sworn on oath deposes and says that:

1. I am the Plaintiff and attorney pro se in this case.

2. At the end of May, 1986, I began an inquiry as to whether or not voters in the 1986 election would be able to write in the names of candidates.

3. I contacted Defendant Morris Takushi, the Director of Elections, who told me that he interpreted the lack of an express statutory authorization to allow write-in votes as a prohibition on write-in voting.

4. I next spoke with Gerard Jervis, Director of Research in the Lieutenant Governor's office, and asked him if the Lieutenant Governor's office would change its policy against write-in voting.

5. On June 6, 1986, I wrote to Mr. Jervis repeating my request and transmitted copies of two court cases that I believed would persuade the Lieutenant Governor's Office of the legal impropriety of its position.

6. On June 24, 1986, Mr. Jervis wrote me stating that the question had been referred to the Attorney General's office.

7. In July, 1986, I received a response from Mr. Jervis. He included a letter that he had received

from the Attorney General's Office in which a deputy attorney general stated there was no reason to change the policy to allow for write-in voting.

8. I filed the Complaint herein on September 11, 1986, and moved in September, 1986 for Summary Judgment and Preliminary and Permanent Injunctive Relief, which motion was granted by this Court by way of an Order entered on September 29, 1986.

9. The Court reaffirmed its Order on October 8, 1986 in response to the State's Motion for Stay Pending an Appeal to the Ninth Circuit Court of Appeals.

10. The State appealed the Decision to the Ninth Circuit Court of Appeals.

11. In May, 1988, the Ninth Circuit Court of Appeals issued a decision stating that this Court should abstain from holding that Hawaii's election laws are unconstitutional as the issue of whether the laws precluded write-in voting was an undecided question of state law. (A true and correct copy of the Ninth Circuit Decision is attached hereto as Exhibit A.)

12. In May, 1988, anxious because another election was coming up and the Ninth Circuit had not yet rendered a decision, I filed a new Complaint in the U.S. District Court, (*Burdick v. Cayetano*, Civil No. 88-0365). All activity in this case was stayed by agreement of the parties pending the outcome of the Hawaii Supreme Court's ruling.

13. By stipulation of the parties the state law issues were certified to the Hawaii Supreme Court.

14. On July 21, 1989, the Hawaii Supreme Court entered a decision holding that the state election laws did not permit write-in voting and that such provision did not violate the Hawaii Constitution. (A true and correct copy of the Supreme Court decision is attached hereto

as Exhibit B.)

15. It is once again an election year and I am once again confronted with the inability to vote for a candidate of my choice if no one I want to vote for becomes a candidate pursuant to Hawaii's election laws.

16. I have no indication that the Election Officials will permit write-in voting and am unaware of any proposed legislation to change the law to provide for write-in voting.

17. I expect that in the 1990 elections, as in the 1986 and 1988 elections, and in elections in the future I will most likely not wish to vote for someone whose name is printed on the ballot. In such elections, I will regard the inability to vote for a person who is not a candidate printed on the ballot as a violation of my rights as a voter and citizen.

18. Unless this Court grants the relief requested, i.e., to hold that Hawaii's Election laws are unconstitutional and that State officials are required to provide for write-in voting, my constitutional rights will continue to be violated and I will be irreparably harmed.

FURTHER, AFFIANT SAYETH NAUGHT.

s/s
ALAN B. BURDICK

[February 5, 1990]
[Jurad Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK, *Plaintiff,* vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; *Defendants.*	)	Civil No. 86-0582 -HMF
ALAN B. BURDICK, *Plaintiff,* vs. BENJAMIN CAYETANO, in his individual capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of Elections, State of Hawaii, *Defendants.*	)	Civil No. 86-0365 -HMF

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF

The Motion of Plaintiff Alan B. Burdick for Summary Judgment and for Permanent Injunctive Relief was heard by this Court on March 26, 1990, before the Hon-

orable Harold M. Fong.

The Court finds that there are no facts in dispute. Hawaii's election laws, as decided by the Hawaii Supreme Court in a decision entered in Appeal No. 13157, expressly preclude write-in voting. The Court finds Hawaii's election laws which prohibit write-in balloting constitutes an infringement on the First and Fourteenth Amendments rights guaranteed by the Constitution of the United States of America. Further, such constitutional infringement on Plaintiff's voting rights is a violation of Plaintiff's civil rights pursuant to 42 U.S.C. 1983.

Further, the Court holds that the rights of Plaintiff and other voters infringed on by Defendants' present policies regarding write-in balloting is of serious enough magnitude to warrant the issuance of an Order Granting Permanent Injunctive Relief.

The Court therefore orders as follows:

1. Summary Judgment in favor of Plaintiff is entered and Judgment is entered herein declaring that Hawaii's elections laws violate Plaintiff's constitutional rights by failing to provide for the casting, counting and reporting of write-in votes.

2. Defendants Takushi and Cayetano are hereby enjoined from refusing to provide for write-in balloting. Further, they are ordered, by the primary election to be held in 1990, to:

> 1. Provide adequate spaces on the ballots for write-in votes clearly marked as being for such votes. Where a single candidate is to be elected to a given office, one line obviously suffices. Where multiple candidates are chosen (as for example in the election for the State Board of Education), the lines for write-in candidates must equal the number of positions to be filled.
>
> 2. Count all write-in votes and give these votes

> all the same legal effect as other votes.
>
> 3. Publish, in all reports of election results, the names of each write-in candidate who has received votes and the number of votes he or she has received.
>
> 4. Inform the public, in conspicuous language in all voter-information materials, that they have the right to case write-in votes, and that their write-in votes will be counted and published, just like all other votes.
>
> 5. Instruct all election officials and workers to advise voters that they may cast write-in votes and that such write-in votes will be counted, published and shall have the same legal effect as all other votes.

3. Plaintiff will be awarded attorney's fees and costs pursuant to 42 U.S.C 1988 upon approval of his application for fees and costs by this Court.

DATED: Honolulu, Hawaii, _____

_____
JUDGE OF THE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Captions Omitted In Printing]

DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT AND CONDITIONAL COUNTER-MOTION FOR STAY

Come now Defendants Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii, Defendants in No. 86-0582, together with their successors in office, and Defendants Benjamin Cayetano, in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, Director of Elections of the State of Hawaii, Defendants in No. 88-0365, and move this Honorable Court to enter summary judgment in their favor as to each and every claim set forth in the complaints in these consolidated actions, or such judgment in their favor as to each claim as to which they are entitled to judgment.

Without waiving any rights to contest any relief that is entered against them, Defendants conditionally move this Court, should this Court, in any manner, issue an injunction directed to Defendants, or any of them, to stay said injunction pending the filing of a timely appeal to the United States Court of Appeals for the Ninth Circuit within 10 days after issuance of any injunction, and, should the Court of Appeals affirm an injunction directed to Defendants, pending application for a writ of certiorari under 28 U.S.C. § 1254, or for a stay pending appeal only to the Court of Appeals for the Ninth Circuit, or for a temporary stay of not less than 30 days so as to permit Defendants to seek from the United States Court of Appeals for the Ninth Circuit, or from the Circuit Justice, a stay pending appeal.

This motion is made pursuant to Fed. R. Civ. P. 7, 12, 56, 62, Fed. R. App. P. 8, Local Rule 220, Ninth Circuit Rules 27-2 and 27-3, the statutes and laws of the United States and of the State of Hawaii, the attached memoranda and accompanying declarations and exhibits, such matters as ma, be subject to judicial notice, and the record in these consolidated actions, C.A. Nos. 88-2689 & 86-2703 (9th Cir. 1988), and No. 13157 (Haw. 1989).

Dated: Honolulu, Hawaii, April 19, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Captions Omitted In Printing]

DECLARATION OF DWAYNE YOSHINA

I, Dwayne Yoshina, pursuant to 28 U.S.C. § 1746, declare:

1. I am currently the Deputy Executive Officer for Elections in the Office of the Lieutenant Governor, State of Hawaii. In that capacity, I am responsible for all phases of elections operations that are within the jurisdiction of the Lieutenant Governor, in his capacity as chief election officer of the State of Hawaii. My statements herein are based on personal knowledge.

2. The date of the 1990 primary is September 22, 1990. Under federal guidelines, absentee ballots for overseas voters for the primary and general election must be mailed no later than 35 days before each election. Printing of the primary ballots (estimated in excess of 2.2 million cards for all races likely to be at issue) will commence July 28, 1990, after the July 24, 1990, filing deadline. Printing of the approximately 2.3 million ballot cards for the 1990 general election will commence September 14, 1990.

3. Based upon our experience in attempting to comply with this Court's injunction in 1986, it would be feasible to have a so-called "ballot envelope" be used in Hawaii's primary and general election, if this Court orders write-in voting at this time. However, this conclusion is subject to at least the following qualifications anticipated at this time.

4. First, it will cost approximately $50,000 to purchase the ballot envelopes, presumably from a mainland printer. To comply with public bidding laws, Defendants must know whether to begin the procurement process no

later than mid-May, otherwise additional cost may be incurred by reason of having to waive the bidding rules under compulsion of federal law.

5. Second, it is doubtful write-in voting at the primary can be integrated with Hawaii's election calendar, insofar as a significant number of write-in votes require possibly up to a month or more to count, even with specially hired workers. Particularly in light of the requirements of the Overseas Voting Rights Act, if, in a close race, write-in ballots were determinative at the primary, it would likely be impossible to meet the deadlines for mailing the ballots required by the United States.

6. Third, given the absence of a federal order, and the presently controlling decision of the Supreme Court of Hawaii, there is no money in the budget for the supplies or staff needed to implement write-in voting at the primary or general election.

7. Fourth, delays following write-in voting at the general election can be expected to delay election results up to a month or more if write-in voting is required at the November election.

8. Fifth, while, if write-in voting is judicially ordered, every effort would be made to preserve the secrecy of the ballot, inevitably the presence of write-in voting will lead to risks of breaches of confidentiality of the voters ballot choices.

9. Sixth, if it is not clear whether a candidate is nominated by obtaining a plurality of votes at the primary by reason of write-in votes, timely placement of names on the general election ballot will likely be impossible. This is especially true in this year, as the gap between the primary and general election is the shortest gap allowed by law, i.e., 45 days. Given our present contract with the ballot printer, any changes in the printing schedule may lead to penalties against the State.

10. Seventh, write-in voting will require additional changes to the ballot counting computer programs which are purchased from an independent contractor. It is uncertain whether these adjustments can be made in time to comply with the State's requirements that the system be functioning in time.

11. Eighth, write-in voting will also require changes to the ballot preparation programs. It is estimated the revisions may take between 6 to 8 weeks. It is uncertain whether these adjustments can be made under the existing time lines.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Honolulu, Hawaii, on April 19, 1990.

s/s
DWAYNE YOSHINA

[Deposition of Alan B. Burdick (August 26, 1988), set forth as "Exhibit D" to Declaration of Steven S. Michaels, submitted in support of Defendants' Counter-Motion for Summary Judgment]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DEPOSITION OF ALAN B. BURDICK, Pro Se Taken on behalf of Defendants at the law offices of Johnston & Day, 222 Merchant Street, Honolulu, Hawaii 96813, commencing at 1:42 p.m., on August 26, 1988, pursuant to Notice.

BEFORE:

LAURIE M. SAVAGE, CSR 264
Registered Professional Reporter
Notary Public, State of Hawaii
Ralph Rosenberg Court Reporters, Inc.

APPEARANCES:

For Plaintiff: MARY BLAINE JOHNSTON, ESQ.
Johnston & Day
222 Merchant Street
Honolulu, Hawaii 96813

For Defendants: STEVEN S. MICHAELS, ESQ.
Deputy Attorney General
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

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EXHIBITS FOR IDENTIFICATION

Johnston, dated August 23, 1988

PLAINTIFF'S EXHIBIT 2:
Page A-10, Wednesday, July 20, 1988, Star-Bulletin.

DEFENDANTS' EXHIBIT 1:
Notice of Motion; Motion For Amendment of Certification Order; Memorandum In Support of Motion For Amendment of Certification Order; Declaration of Counsel; Proposed Order; Certificate of Service.

ALAN B. BURDICK, called as a witness at the instance of the Defendants, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

(Disclosure was presented to Counsel.)

EXAMINATION

BY MR. MICHAELS:

Q. Mr. Burdick, my name is Steven Michaels. I'm the deputy attorney general assigned to this case, and we do appreciate you appearing today pursuant to the notice of deposition that was served upon you yesterday.

This notice was served on you yesterday pursuant to an agreement to an agreement with your counsel that this was not an inconvenient time for you, and I was wondering whether you were aware of that agreement and whether you agree that this is the case.

A. A couple of things. First, I understand that this deposition is being noticed in both Burdick versus Takushi and Burdick versus Cateyano. Therefore, we should be speaking of these cases rather than this case.

This time is no more inconvenient than any other time. I consider the deposition to be an inconvenience, an imposition. The matters that you intend to go into are irrelevant to this lawsuit, and I would also point out

that I am here not only in my capacity as plaintiff in these two lawsuits but also as pro se co-counsel for myself.

And I would like to ask Mimi Johnston, who is my attorney in these cases, to supplement this statement.

MS. JOHNSTON: Yes. Before we go on, I just want to put on the record, as I've already written to you, Steve, the purpose for which you've stated you wanted to make the deposition, which you mention at page 22 of your reply memorandum in support of motion for amendment of certification order filed with the federal court in the Burdick versus Takushi case on August 19th, is, quote, defendants are entitled to take the plaintiff's deposition to show that even under the standards of Justice Marshall's dissent in Munro -- that's M-u-n-r-o -- plaintiff was not impermissibly burdened by ballot access restrictions, end of quote.

As we have continually taken the position, as Judge Fong said in his decisions, this is not a ballot access case; it's a voter's rights case. That's the way our complaint is framed.

You choose to continue to try to reframe it to an issue that is not relevant. That is why I wrote you on August 23rd and said that we feel this deposition is totally irrelevant, that rather than move for a protective order, which would just contribute to the ongoing delay that you have managed to effect so far, we would agree to this deposition on two conditions, one, that we will be seeking attorneys' fees both from Mr. Burdick and me, and, two, we intend to move for a Rule 11, sanctions for the taking of it.

I would like to have marked and put in the record a copy of my August 23rd letter to you and, again, express the mention that even though we are willing to appear for the depo and have it taken, that we waive no rights as to challenging the relevancy, the purposes, and the motives behind this deposition.

THE WITNESS: Excuse me. We'd like to make Mimi's letter of August 23rd Plaintiff's Exhibit 1 to this depo.

(Plaintiff's Deposition Exhibit No. 1 was marked for identification.)

MR. MICHAELS: I have no objection to reserving all objections to this proceeding. That is the understanding that I had when we agreed to it. We can litigate all of those matters later. Obviously we would oppose the grounds that you have set forward.

We do believe that under the general First Amendment Doctrine it's relevant and material. Even if our overarching theory under Munro versus Socialist Workers Party does not pan out, it is relevant and material to know whether and how in fact a particular plaintiff or a group of persons who are making a First Amendment challenge to the restriction on the right to cast votes, whether those persons are burdened in fact by the electoral system.

And I do have a short number of questions. I don't anticipate that this will take much time relevant to that issue. But, again, I'm not seeking and I don't think it would be productive to argue back and forth about the legal issues behind this. I'm just here to get some very basic facts, and if we can go forward with that, that would be my understanding on which we're going forward.

MS. JOHNSTON: Ask away.

THE WITNESS: Let me just add one final preliminary point. We will expect -- I would say first that my understanding was that you were going to make this a short deposition, no more than two or three hours. Consequently, I expected that there might be in excess of a hundred questions.

But we expect that there will be questions that are objectionable both for relevancy reasons and for reasons

that I will broadly characterize as a political privilege objections based on inquiries into my political beliefs, my memberships, associations, activities, and anything else that relates to an inquiry into my ideas.

I would consider any such inquiry to be violative of my rights under the United States Constitution and United States Laws, including, but not limited to, the Civil Rights Act, as well as my right to cast secret vote as guaranteed by the Constitution of the State of Hawaii and by the Election Laws of the State of Hawaii, as well as by Rules of Evidence.

So for the purposes of shorthand, I may simply say or my attorney may simply say political privilege objection, and that shorthand is intended to refer to what I've just mentioned.

MR. MICHAELS: We appreciate the nature of this area, and I will try my best not to infringe on any right that we have clear knowledge of.

We do understand that this is a federal question case to which the privilege as set forth and Hawaii law are not automatically applicable. We have done some research into this area and we are sensitive to your concerns, Alan.

If I could just start out, I think that we can get the show on the road and get through the short list of questions that I have.

BY MR. MICHAELS:

Q. Have you ever been deposed before?
A. No, I have not.

Q. And you have never appeared before as a plaintiff in a case?
A. That is not correct.

Q. So you have been a plaintiff in other cases but you were not deposed in those cases?
A. That is correct.

Q. You're aware that your statements today are under oath and if relevant, admissible, and material could be used in the litigation to help sustain our defenses or in other ways relevant to the case?

A. Yes, subject also to other evidentiary exclusions.

Q. You are an attorney licensed under the laws of Hawaii?

A. That is correct.

Q. And how long have you been licensed in Hawaii?

A. Since approximately August of 1982 -- actually I think early September 1982.

Q. And how long have you been a resident of Hawaii?

A. Since May 1982.

Q. And you are familiar with the statutes of the state of Hawaii that relate to elections?

A. I think the question is vague and ambiguous as to what you mean by the word familiar.

Q. Have you read the statutes that are contained in Hawaii Revised Statutes that relate to the conduct of the primary election and the general election?

A. On occasions, primarily two years ago when I first brought the lawsuit entitled Burdick versus Takushi, I read certain of the election statutes.

I have not read them all. I have not refreshed my recollection as to them. I have glanced at a couple of them this morning, but it would be unfair to say that I have a working familiarity with the election laws at this moment.

Q. I appreciate that. They can be complex and difficult to remember.

Mr. Burdick, in your complaint in the Burdick versus Takushi case, is it true that you made mention of the fact that in consequence of the persons who did and did

not submit petitions to be placed on the primary ballot, you believed that you were limited in your choice of people that you could vote for at the primary stage of the election?

MS. JOHNSTON: Just to clarify, are you asking him what the complaint says? Because if you are, I'm going to object. I think the complaint is part of the case file. It certainly speaks for itself. If you have a particular part of the complaint you want to refer him to, you can ask him that.

MR. MICHAELS: Maybe I should clarify that point.

MS. JOHNSTON: Yes, if you would.

BY MR. MICHAELS:

Q. Is it true that today you claim, assuming this litigation goes forward, that as a consequence of the persons who filed and did not file ballot petitions with the lieutenant governor for nomination through the primary system, that your choice was impermissibly limited at the primary stage?

A. Are you referring to the 1986 election?

Q. I'm referring to the 1986 election.

A. In the 1986 election we had of course a large number of races. I made specific mention of the State House of Representatives District in which I reside because there was only one candidate, who happened to be a candidate in the Republican primary, and there was no Democratic candidate.

I will not tell you which primary ballot I took, whether it was Democratic or Republican or independent, and to that extent I cannot answer your question because it would impermissibly delve into a privileged area.

I would say, however, that the point of my complaint, and that's paragraph seven of the complaint, was that there was only one candidate destined to appear on

the general election ballot.

And my understanding was that by virtue of the practices of the Office of Lieutenant Governor at the time, and I do not know whether it is expressly authorized by statute, the one candidate who filed was deemed to have been elected as of the closing of receipt of petitions for the primary even though it was at least two months before the primary election and three or four months before the general election.

No votes had ever been cast, but this man was deemed to have been reelected, and I objected to that.

Q. When you say pursuant to the practice of the Office of Lieutenant Governor, did you ever become aware of a certificate of election being issued to that candidate prior to the time of the primary election?

A. No, I did not. The newspapers in 1986 would give lists of who is running in the primaries and so on, and I happen to have in front of me a copy of the Honolulu Star-Bulletin for Wednesday, July 20, 1988, page A-10. This is 1988, the one I have here.

In 1986 I recall the newspaper, both the Advertiser and the Star-Bulletin, had very similar kinds of charts showing who's running in what race, and the description in the Advertiser and the Star-Bulletin said that where the candidates are unopposed they are deemed elected.

I assumed that that was something they had gotten from the lieutenant governor's information office. The Star-Bulletin article that I just mentioned from July 20th of this year is a little more careful.

However, let me just read this. "Nineteen unopposed state lawmakers and five county candidates will be on the primary election ballot even though they are automatically elected because of lack of opposition. Three candidates for state Senate and 16 for the state House are unopposed." That's merely a clarification of the first sentence. Now I'll continue with the quote. "These winners are listed in capital letters."

So there it is. They are automatically elected be-

cause of lack of opposition. This is July 20th, 1988, almost two months before a single vote has been cast in the primary election and four months before the general election. These people are automatically elected, according to the Star-Bulletin, and I assume the Advertiser has similar language.

MS. JOHNSTON: I would like to have this marked and put in as an exhibit to the deposition.

THE WITNESS: That's fine. Plaintiff's Exhibit 2 will be this page. I'm sure we can stipulate to it being xeroxed and put in as perhaps several sheets of xeroxed paper.

(Plaintiff's Deposition Exhibit No. 2 was marked for identification).

BY MR. MICHAELS:

Q. The document that you've just referred to is of course a statement in the newspaper; is that correct?

A. That is correct, and undoubtedly it's hearsay.

Q. An undoubtedly it's hearsay and it's not admissible for purposes of any admission by the Office of Lieutenant Governor?

A. I realize that, but it certainly is a piece of information that has been publicly distributed, and I am unaware of any letter to the editor in either newspaper by any person associated with the Office of Lieutenant Governor to disabuse people of the information convey by the newspaper.

Therefore, the public has been told that these nineteen unopposed candidates have been automatically elected two months before the primary and four months before the general election.

Q. Mr. Burdick, can you tell me which State Senate District you live in, to the best of your knowledge?

A. It is the State Senate District currently repre-

sented by Mary George. The number is ten.

Q. And have you consulted with the lists published by the Office of Lieutenant Governor as to whether Senator George faces any opposition in her own primary or whether in fact there is a candidate running in the Democratic primary?

A. I have not consulted directly with the Office of Lieutenant Governor. I've relied on the newspaper and the sign waving that I see. There are two Democrats who are running, according to the newspaper article, one Bud Pinkosh and one Eric Poohina.

Q. So that there are candidates opposing Senator George on the Democratic side; is that correct?

A. As far as I know, that is correct.

Q. And based on your knowledge, one of those two Democrats will go on to face Senator George in the November election, whichever one wins; is that correct?

A. Assuming that neither one of them withdraws or dies and assuming that one of them is elected and assuming that there are no write-in votes that are allowed to be cast and counted, then one of those two will presumable be the Democratic candidate in November against Mary George, yes.

Q. Did you yourself, and again without specifying which party are on behalf of which candidate, did you yourself sign any petition that would have under state law been used by a candidate for purposes of placing that person's name on the primary ballot for 1986, to the best of your recollection?

A. For which political office?

Q. Well, why don't we go down through the offices that were up in 1986.

A. I will make it simple. I have not signed a petition for any person seeking to be a candidate of the Democratic or Republican primary -- party in a primary

election in 1986 or in 1988.

Q. Can you tell me whether you signed any petitions on behalf of any other person in any other party?

A. I refuse to answer that question on the grounds that it invades my political privilege.

Q. Did you ever sign any petition that was being circulated for the purposes of registering a new party in the state of Hawaii pursuant to the provisions of Chapter 11 of the election statutes? And you can refer to Chapter 11, Section 11-62, if you want to see the provision to which I'm referring.

A. I assert the same objection.

Q. And I assume that if I asked specifically for an answer, you will absolutely refuse to answer those questions on advice of counsel?

MS. JOHNSTON: Well, when you say those questions, I don't know what you're talking about.

MR. MICHAELS: Okay. I will ask specifically of counsel whether you are instructing the witness not to answer the question whether Mr. Burdick himself has ever signed a what we call 11-62, 63 party petition to place a party on status as a political party in Hawaii.

MS. JOHNSTON: Could we take a slight break so that I could talk with my client?

MR. MICHAELS: Sure.

(A recess was taken.)

MS. JOHNSTON: Could you read back the last question, please.

(Reporter read the pending question.)

MS. JOHNSTON: First of all, I'm going to object to the question on the basis of relevancy. Again, you're asking questions that have to do with ballot access and nothing having to do with voters' rights.

Second, to the extent that the question seeks any information as to specific political candidates or parties that Mr. Burdick may have in some way been associated with or supported by signing of any such petitions, we'll object on the basis of the political privilege he's already mentioned, but he may go ahead and provide a further answer.

THE WITNESS: Let me also add that our objections relating to ballot access apply to the line of questions that you've asked me regarding signing of petitions for candidates in either the Democratic or Republican primary.

Without waiving any of the objections, I would say that I have on occasion signed petitions for ballot access of various persons and -- of various candidates and political parties. I will not identify any of them.

To the extent that those petitions have been submitted to the appropriate governmental authorities, my signature would be a matter of public record.

I would point out that I believe in easy ballot access for candidates but that that belief is supplemental to, and in no way substitutes for, my belief that voters have the right to refuse to vote for any candidate on the ballot no matter how that candidate got on the ballot, whether that candidate is a candidate of one of the major political parties or a so-called third-party candidate or an independent.

The voters have the right at any time to vote for anyone who -- regardless of whether that person is a listed candidate on the ballot or not.

BY MR. MICHAELS:

Q. Do you know whether any of the petitions that you have signed were successful in placing a candidate or an issue on the ballot?

A. Are we getting into political issues now or just candidates?

Q. Why don't we just stick to candidates.

A. I frankly cannot tell you. I do not know whether those specific petitions have been successful or not.

Q. Did you sign any such petitions in 1986?

A. I believe so.

Q. And you don't know whether they were successful or not?

A. I do not know.

Q. Can you tell me which petitions you did sign in 1986?

A. I told you before that I would not answer that question on the grounds of political privilege. I also object to the question on the grounds of relevance.

MS. JOHNSTON: And I will add that I'm instructing my client for those two reasons to not answer that question.

Q. And I assume that your answer would be the same with respect to -- well, let me first ask the question. Did you sign any petitions in 1988?

A. Any such petitions --

Q. Petitions for candidates in 1988.

A. I believe so, but I'm not sure.

Q. I assume if I asked you the question as to on behalf of which candidates you signed, that we would have the same objection and instruction not to answer?

A. That is correct, the same objections, both objections.

MS. JOHNSTON: Instead of assuming, why don't you just ask the question so we keep the record really clear.

Q. Have you ever yourself circulated petitions on behalf of a candidate?

A. I object to the question on the grounds of rele-

vance.

Q. I'm simply trying to establish whether you as a person in our political system are familiar with how difficult it is to obtain signatures.

MS. JOHNSTON: Well, I'm going to repeat the objection. Steve, how is that relevant to our lawsuit?

THE WITNESS: I think it's also an argumentative question. It assumes facts not in evidence.

MR. MICHAELS: Are you going to instruct your client not to answer the question of whether he's ever circulated any petitions?

MS. JOHNSTON: Yes, I'm going to instruct him that. It's totally irrelevant to the lawsuit.

THE WITNESS: This lawsuit is about voters' rights, the right of a voter in the voting booth to choose to vote -- to cast his vote or her vote for the candidates listed or to choose not to cast a vote for the candidates listed and to cast a vote for someone else.

It has nothing to do with the circulation of petitions for candidates, whether they be successful or unsuccessful.

BY MR. MICHAELS:

Q. Do you know whether other than the one candidate that you referred to with respect to 1986, whether there were any other races in which the November ballot in which you were entitled to vote for had an unopposed candidate?

A. To make it really clear, in the 1986 election Mr. John Medeiros, who is a Republican candidate for the State House of Representatives in District No. 19, was unopposed. I am not sure at this time whether there were other persons who were unopposed in the November election.

There were some candidates, I believe, who may

have been unopposed in the Board of Education election, and I frankly do not recall whether the Board of Education, which is a nonpartisan election, was September or November.

Q. Do you know whether the Board of Education election is for at-large seats and so that if there are more candidates than seats no one is technically unopposed?

A. Would you repeat that question?

Q. I'll break it up into two questions. First, do you know whether the Board of Education elections are held on an at-large basis?

A. They're not held on an at-large basis. They're held by a mishmash of Oahu at large and then some Oahu districts, but you get to vote for people in districts outside of where you reside.

In other words, candidates must be from certain areas on Oahu but they're elected countywide. It's an absurd system.

Q. You're not challenging that system in this lawsuit?

A. Not in the present lawsuit, either of the present lawsuits.

Q. Do you know how many signatures its takes to get a person on the primary ballot for, say, a member of the State House?

MS. JOHNSTON: I'm going to object to that question on the basis of relevancy.

MR. MICHAELS: And are you instructing the client not to answer that question?

MS. JOHNSTON: No, I did not instruct him not to answer.

BY MR MICHAELS:

Q. Okay. Answer that question.

A. I am sure of the exact figure, but I think it's somewhere between ten and twenty people.

Q. And do you know the number of signatures required to get a person on the ballot for a statewide office or for the office of the United States Representative to --

MS. JOHNSTON: Same objection.

A. I don't know the figures for such offices.

Q. Have you ever at any time circulated petitions in the state of Hawaii either for a candidate or for a political party?

MS. JOHNSTON: I'm going to object on the basis, one, relevancy; two, political privilege.

MR. MICHAELS: And are you instructing him not to answer?

THE WITNESS: I'm refusing to answer.

MS. JOHNSTON: Okay. And I will concur with his refusal.

BY MR. MICHAELS:

Q. You've been a resident of Hawaii since about 1982?

A. Since May of 1982.

Q. And you've had a chance to observe the customs and practices of politics in Hawaii for over six years?

A. Yes.

Q. And generally the weather in Hawaii is of a tropical nature and we don't have snow or other kinds of conditions to keep people necessarily inside?

MS. JOHNSTON: Wait, wait, wait.

THE WITNESS: Let the record show laughter by --

MS. JOHNSTON: Yes, right. Is that a question,

first of all?

MR. MICHAELS: That is a question.

MS. JOHNSTON: I object. It has no relevancy. But certainly do answer the question, Alan.

THE WITNESS: Hawaii has lovely weather. That's one of the reasons I live here.

MR. MICHAELS: Based on your knowledge as a resident of the state of Hawaii have you any opinion as to how long it would take to get ten to twenty signatures?

MS. JOHNSTON: I'm going to object on the basis of relevancy.

THE WITNESS: And my opinion is not relevant, either.

BY MR. MICHAELS:

Q. So you have no opinion?

A. For the sake of proceeding with this deposition, I am sure it is quite easy to get somewhere between ten and twenty signatures on petition.

It is not relevant because my lawsuit is based on the right of a voter to reject the names of all the listed candidates on the ballot and vote for someone else on the basis of anything, including events that may have occurred after the date of closing for the receipt of primary petitions, after the date of a primary, or anytime in between.

Q. Okay. Maybe we can speed this all up by saying that I'm asking you a question. Is it the premise of your lawsuit that no matter how easy it is for a person to get their printed name on the ballot --

A. Their name printed on the ballot.

Q. Their name printed on the ballot, and no matter how late in the season the deadline falls for a person

getting their name on the ballot, a voter has a right under the United States Constitution to cast a vote for someone who -- notwithstanding the lack of any limits upon a person getting their name printed on the ballot -- the voter has the right to cast their vote for somebody else if they want to?

A. That is correct, because my lawsuit is a voters' rights lawsuit and is not a ballot access lawsuit.

And I believe that that point has been made very clearly in our briefs and memoranda throughout the course of Burdick versus Takushi and as set forth also in the complaint in Burdick versus Cayetano.

Q. And so it would be your position that if a state provided unlimited rights in candidates to have their names printed on the ballot, that notwithstanding that unlimited access or right in a candidate to have their name printed on the ballot, that a voter, such as yourself, would have the unlimited right under the United States Constitution to cast a write-in vote for someone's name who is not on the printed ballot either at the primary or at the general election?

A. That is correct. It's operating on the basis of a hypothetical, but that is correct. The basic point is that this is a voters' rights lawsuit.

Q. Do you yourself know of any third-party candidates, and by third-party candidates I mean candidates other than those in the Democratic or Republican parties, who were on the ballot in 1986?

A. For what offices?

Q. For any office.

A. There were Libertarian candidates, I believe, in a number of the offices where I was able to cast my vote. Whether there were any independents or other third-party candidates, I cannot recall at this moment. I'd object to the question on the grounds of relevance.

Q. But you admit that there were Libertarian party

candidates in 1986?

A. I don't know if the word admit is a correct word in this situation. I object again to the question -- to all of these questions on the grounds of relevance.

There were. It's a matter of public record. There was a Libertarian candidate I'm pretty sure for the United States House of Representatives. If Inouye was running for reelection that year, which I believe he was, there was, I believe, one running against him for the United States Senate.

Q. Do you know whether there were any third-party candidates running in 1984, if you recall?

MS. JOHNSTON: I'm going to object on the basis of relevancy.

A. There were third-party candidates running for President of the United States as well as U.S. House of Representatives. There was at least -- there was a Libertarian candidate for the U.S. House of Representatives.

I don't know about any other third-party candidates or independent candidates. I'm sure there was a Libertarian candidate for one or more of various other offices.

Q. And you would make the same statements with respect to 1982?

MS. JOHNSTON: That there were or were not?

MR. MICHAELS: That there were candidates of third parties running for various offices in 1982.

THE WITNESS: I again object to the question on the grounds of relevance. There was, I believe, also a Libertarian candidate for the United States House of Representatives. Whether there were other third-party candidates or any independent candidates in the election district where I voted, I do not recall.

I'd also interpose the best evidence objection. These are matters of public record, and I'm sure that since you

are representing the Office of Lieutenant Governor you could find out this information definitively, if you wish, just by consulting your client.

MR. MICHAELS: Mr. Burdick, just to clarify the basis of your lawsuits in the two different election years, is it your position -- let's just take the hypothetical of Senator George this year.

She faces one of the two Democrats who are running in the Democratic primary, assuming that those Democrats go head-to-head in September.

I'm not asking whether you would want to do this, but is it the premise of your lawsuit that a voter could vote for the Democrat that lost in the Democratic primary as a write-in candidate at the November election?

MS. JOHNSTON: I'm going to object, one, lack of clarity of the question. When you say could vote, what do you mean?

BY MR. MICHAELS:

Q. I would like to know whether under the legal theory that you are advancing in your case -- I don't recall the two names of the persons running.

A. They are Bud Pinkosh and Eric Poohina.

Q. Okay. My hypothetical is as follows. Let's say that we have the Democratic primary in September and Mr. Pinkosh is the loser in that primary.

Mr. Burdick, you're claiming that this is a voters' rights case and you want to establish some rights in the voters --

A. Get them reaffirmed.

Q. However one chooses to characterize it. You would like to see a voter have the right to vote for Mr. Pinkosh at the general election. Is that correct or incorrect?

A. As a specific example, yes. And I consider any statute that purports to protect the so-called integrity of

political parties by banning write-in voting for sore losers, so-called, such as in this hypothetical, Mr. Pinkosh, as a violation of my constitutional rights.

I further believe that Hawaii's absolute ban on write-in voting is overbroad, even if it were constitutional, which I disagree with, that the government can tell me who I may and may not vote for by saying that I may not cast a write-in vote for a loser in a primary when the general election occurs.

To the extent that statutes have been upheld that prevent ballot access by a primary loser, I do not believe that those court decisions go so far as to prevent voters from exercising their constitutional rights to vote for whomever they please, whether or not those people are on the ballot.

Q. Mr. Burdick, to test another hypothetical, it's your petition that a voter has a right to vote for someone notwithstanding the fact that that person has never in any way registered with the Office of the Lieutenant Governor, has never obtained ten to twenty-five signatures -- whatever the requirement is -- and has never filled out the requirements for sworn statements as to their qualifications and so on?

A. Voters have the right to vote for anyone they please regardless of whether that person has -- made any application of any sort to the appropriate election officials to become candidates. This is not a ballot access case. This a voters' rights case.

Q. And just to clarify the bases for your lawsuits, plural, is there any limitation upon the obligation of the state to seat a person who obtains a plurality of votes at the general election stage or if this were a contested primary at the primary stage?

MS. JOHNSTON: I'm going to object on the basis of relevancy. I don't believe that our complaint in any way goes to the issue of the government seating a candi-

date that's been voted for in an election.

Q. Okay. Just to follow up on that, because I think it's real important, let's go back to our example of Mr. Pinkosh.

Assuming that Mr. Pinkosh lost in the primary, let's just assume that fact, and then let's assume that there's a write-in, if your proposal were adopted by the federal courts or the state courts or the state --

A. It's not a proposal. It's a statement of constitutional rights.

Q. You're entitled to your opinion for the time being. Let us assume that write-in voting were established under your theory of the United States Constitution.

Are you saying to us that if Mr. Pinkosh received a plurality of the votes at the general that would be the only way that he could obtain that if write-ins were implemented, is it your position that Mr. Pinkosh would have a right to be seated in the Office of State Senator and to oust Senator George?

MS. JOHNSTON: I'm going to repeat my objection to the question as it relates to our lawsuit. But if Mr. Burdick wants to answer what his philosophy about that is, which has no relevance one way or the other, he can answer.

A. I would say my understanding of the law in approximately forty-eight of the states of the United States, probably all of the territories, is that in this hypothetical Mr. Pinkosh would be declared the winner and he would be seated.

Only in Hawaii would I expect to see some objection from the Office of Lieutenant Governor. Hawaii is totally out of step with the rest of the United States.

Q. Would you say that in the state of Oklahoma, also, there would be no objection to the seating of Mr. Pinkosh under these circumstances?

A. I do not pretend to be familiar with Oklahoma's

election laws. I know you rely heavily on the fact that Oklahoma seems to -- seems to, I emphasize -- be with Hawaii in this very small minority of states that refuses to recognize the right of a voter to cast write-in votes.

I'm sure we can find other situations in which Hawaii is involved in unconstitutional activities and has one or two fellow states with it on such unconstitutional practices.

Q. As to the unopposed races in 1988, do you know for a fact whether there are unopposed races in both, that there are races where a Democrat is unopposed and that there are also races where a Republican may be unopposed?

MS. JOHNSTON: I'm going to object on the basis of relevancy.

A. Your question is unclear as to whether you're talking about unopposed within a primary but facing a general election opponent, or are you speaking of the nineteen people who are not opposed either in the primary or the general and have therefore been automatically elected because of lack of opposition, as the Honolulu Star-Bulletin characterizes it?

Q. Isn't it true frequently that in a party the encumbent will not be opposed at the primary stage?

MS. JOHNSTON: I'm going to object on the basis of relevancy. You can answer that.

A. My own experience as an observer of politics is that that statement is generally correct. Although, the word frequently of course is ambiguous.

Q. So that one would expect a fair number, if Hawaii is no different than any other jurisdiction, a fair number of situations in primaries, because of the natural course of politics people will not oppose an encumbent?

A. Again, I'm going to object to this entire line of questioning on the grounds of relevancy, and we can

have a good political science seminar here, Steve. That's just fine. Yes, I agree with your question.

Q. And you also would concede that there may well be situations in which an encumbent is so overwhelmingly popular that no one will oppose that person even from the other party; is that correct?

A. I object to the use of the verb concede, but otherwise I agree. Again, I object on the grounds of relevancy. I want to make it clear there's a standing objection to this whole line of questioning.

Q. I have no objection to making a running objection. It will probably save us some time.

Let me just ask the general question. At this stage of the election season, without telling me which person it is in any race in which you are entitled to vote at the primary stage, are there specific candidates who are not in the race now in one or the other parties -- well, let me make that question clear.

At this time are there people who are not presently signed up for the primary whom you would like to vote for on a write-in basis either at the primary or the general election in the races in which you're entitled to vote?

A. There are currently certain races in which I am entitled to vote where I wish to cast a write-in vote in all probability at the primary level and almost certainly in the general election, depending on the outcome of the primary.

Q. Is there any particular race where you can tell us you wish to cast a write-in vote today?

A. I object on the grounds of political privilege.

MS. JOHNSTON: Yes, I will join that objection.

MR. MICHAELS: And you're also instructing him not to answer? You're also instructing your client not to answer?

MS. JOHNSTON: Yes. I'm telling my client he does not have to answer that question because it invades his constitutional right to political privilege.

MR. MICHAELS: I appreciate what your position is on that. Although, I disagree with it under this circumstances.

THE WITNESS: Could you explain? Are you saying that I'm waiving certain privileges by bringing this lawsuit?

MR. MICHAELS: What I'm saying is that the court is entitled to know in which races we have a concrete controversy so that I can formulate a defense.

THE WITNESS: Okay. Mr. Michaels, we have a concrete controversy in every single race because none of us has a crystal ball and none of us knows what's going to happen by election day.

There may be a candidate in any given office whom I support enthusiastically in the primary and that candidate wins the primary, much to my delight, and a week later or a month later that candidate is prosecuted for election fraud, for any of a multiplicity of crimes that might be hypothesized -- the candidate becomes extremely ill, the candidate takes a position on an issue of great importance to me that I find to be an outrageous position, that I feel that the candidate has violated the trust that I had placed in him or her, or any of those reasons or none of them.

MS. JOHNSTON: Death. You forgot death.

THE WITNESS: And death. I am entitled to cast my vote in the general election for anyone whom I choose, including casting a vote against the person for whom I voted in the primary who actually won the primary.

BY MR. MICHAELS:

Q. So your position then is that the procedures for removing people from office once they have been seated, such as impeachment or forfeiture of office, if that is in fact a civil penalty that exists in Hawaii, are constitutionally insufficient to take care of the problem that you just identified, that is, things changing before election day?

A. Mr. Michaels, were you here in Hawaii in 1982?

Q. No, I was not. This is not your deposition of me, and if you could just stick to answering the questions. The question that I had was whether --

A. Let me give you a specific example.

Q. I'm just asking you the question. If you can answer it, answer it. If you want to make a speech, you can file it in your court documents.

The question I had is under your theory, the procedures for removing people from office once they're elected and seated is constitutionally insufficient to deal with the problem that you're talking about, that is, where people for one reason or the other, maybe they even changed their mind, don't like the person that is chosen at the primary or at the general election?

MS. JOHNSTON: Before you answer, I object on the basis of relevancy. Procedures for removal of people from office has absolutely nothing to do with the issue of voter being able to vote for whom he chooses.

If Mr. Burdick wishes to continue the political science debate with you, he may answer the question.

A. I most vigorously consider impeachment procedures to be an inadequate remedy for voters because, for example, and this is only one example, politicians cannot be impeached simply because they change their positions on political issues.

Thus, in the hypothetical that I have mentioned to you, if my reason for wishing to cast a write-in vote against someone for whom I had already voted in the primary were because that person had changed his or her position on an issue that was critical to me, that

would not be an impeachable offense, and I don't -- I also don't feel that the voters should have to tolerate a situation in which a person whom they do not want to see elected is seated in office and it takes the very long, drawn-out, cumbersome process of the impeachment machinery to remove that person in those limited situations where my reason for voting for a write-in candidate against that particular candidate would be an impeachable offense.

Q. And so just to extend that, is it true or is it not true that your theory in this case is that a process of recall by the voters which does not depend upon there being an impeachable defense is also what you described as an inadequate remedy?

MS. JOHNSON: Let me again object on the basis of relevancy. Just a second. Let me talk to him.

(Discussion off the record.)

THE WITNESS: The recall procedure, as I understand it, is available at the level of the City and County of Honolulu but does not apply to state offices, such as the State House of Representatives, the State Legislature, the State Board of Education, governor, lieutenant governor, United States senator, United States representative, president and vice president of the United States.

Therefore, the recall mechanism, which is also cumbersome, expensive, and fraught with delay and probably litigation, is an inadequate remedy for the voter who wishes to cast a write-in vote.

MR. MICHAELS: Okay. We've gone on for about an hour, if I could take five-minute break. There's only one other area that I think I want to get into that I want to make sure that I've exhausted. I'm pretty sure that I have.

(A recess was taken.)

THE WITNESS: For simplicity's sake, on a couple

of occasions before the break I referred to something to the effect that this is a voters' rights case rather than a ballot access case. I meant to speak of both cases, in the plural, in each instance.

BY MR. MICHAELS:

Q. Mr. Burdick, you yourself are an attorney of course, but you have naturally and properly been represented in this case by Ms. Johnston, correct?

A. As well as the American Civil Liberties Union, yes.

Q. And at all times their counsel has been in your judgment consistent with your interests and desires as a plaintiff?

A. I'm going to object to answering that question at the present time. If you show me how it may be relevant, I may answer.

Q. Sure. Why don't we get right to it. Did you ever have occasion to review the document entitled Stipulation Requesting the United States District Court for the District of Hawaii To Submit Certified Questions to the Supreme Court of the State of Hawaii?

A. Yes.

Q. You did review that document yourself?

A. Yes.

Q. I'd like to now show you an entire document which is styled on the front Notice of Motion, with accompanying papers, and it bears a file stamp date of August 1st, 1988, included within that is an Exhibit A to Declaration of Counsel.

Since I'm not the witness I will not testify as to what is stated, but I would simply like to direct your attention to the Exhibit A to that declaration, which purports to be a stipulation requesting the U.S. District Court, so on and so forth. And I would like to mark the whole exhibit as Defendants' Exhibit 1, if we could.

A. Okay. The entire document that was filed in Burdick versus Takushi bears a file stamp on the cover of August 1, 1988, and the stipulation to which Mr. Michaels has referred to me bears a separate file stamp of July 6th, 1988. At the bottom of the first page there's a handwritten, quote, A, end quote.

Now, what is your specific question with regard to this stipulation?

Q. I am asking you to testify whether prior to the filing of that document you read that document and whether you approved of your attorney signing that document on your behalf? And here I'm referring to the so-called Exhibit A, which is the stipulation filed on July 6.

A. It is a three-page document, not to be confused with what follows it, which has a stamp -- a rubber stamp exhibit, with a line, and then the letter A written above the line.

In answering your question, Mr. Michaels, I looked at this document at one point, perhaps on more than one occasion, before it was filed. I cannot tell you whether I looked at it in its final form and approved it in its final form.

Q. There is, is there not, an attachment to the document I will call the stipulation called an exhibit to that; is that correct?

A. The stipulation refers at the very last line of the text -- the last paragraph of the text of the stipulation on page 3 reads as follows, a proposed Order Certifying Questions of Hawaii Law to the Supreme Court of the State of Hawaii is attached hereto as Exhibit A, and then follows the document that I've just mentioned that has the rubber stamped exhibit -- the words -- the word exhibit rubber stamped at the bottom of the first page, and that document is captioned Order Certifying Questions of Hawaii to the Supreme Court -- strike that, Order Certifying Questions of Hawaii Law to the Supreme

Court of the State of Hawaii: Exhibit 1.

Q. And is it true that the identification of counsel on that exhibit refers to the three counsel who have represented you in this case?

A. We are now referring to the order --

Q. Yes.

A. -- which has the names of Kirk Cashmere, who is with the American Civil Liberties Union, Mary Blaine Johnston, and myself, pro se. Those names are indeed on this Exhibit A.

Q. And did you review or have the opportunity to review that Exhibit A prior to its filing in the district court?

A. As with the stipulation, I had an opportunity to look at this document, make comments and certain changes on it, but I cannot tell you right now because I do not remember whether I saw this document in its final form before it was filed and whether, if so, I approved it or not.

Q. Do you have any claim that your attorney was not authorized to file that stipulation on your behalf?

A. I did not say that.

Q. I understand that. So do you have any claim that your attorney was not authorized to file that stipulation?

A. I'm not claiming that she was not authorized to file this stipulation. No, I'm not.

Q. And you have no claim that she was not authorized to file that attachment?

A. What attachment?

Q. The proposed order.

A. That is correct.

Q. If that's your testimony --

A. I'm referring now to the three-page stipulation

and the two-page order.

Q. That's your testimony?

A. That's what I'm testifying to right now, yes.

MR. MICHAELS: That will be marked as Defendants' Exhibit 1.

THE WITNESS: Now, what is being marked?

MR. MICHAELS: The entire document, which incudes within it the documents to which we have just been referring.

(Defendants' Deposition Exhibit No. 1 was marked for identification.)

MR. MICHAELS: I have no further questions. This is a deposition at which obviously you can ask cross if you want.

MR. JOHNSTON: I have a couple questions.

MR. MICHAELS: Sure. I would like to reserve the right to get into anything that you open, but otherwise I have nothing further.

EXAMINATION

BY MS. JOHNSTON:

Q. Mr. Burdick, you've testified that your case is premised on which you understand your constitutional right and the right of all voters to vote freely for candidates of their choice.

In the complaint of Burdick versus Takushi and again in Burdick versus Cayetano you set forth how the prohibition of write-in voting affects you.

Are you aware of any other effects of the prohibition of write-in voting to other voters in this state?

A. You mean how the public has been adversely affected in the past?

Q. Right, by the failure of Hawaii to provide for

write-in voters.

A. I think the failure is egregious. In every single election that has been unopposed where the government declares that these people are automatically elected because of lack of opposition, I feel that the people have clearly no right to either affirm their support for the unopposed candidate because the government doesn't even bother to count the votes or to state their opposition to the candidates who are unopposed by casting write-in votes. That is a problem that repeats itself from election to election.

In addition, there's been at least one instance in recent years, situations in which major matters have arisen after a primary that have effectively disenfranchised the voters who tend to cast their votes for one political party or another.

And I refer specifically to the 1982 incident involving one Ross Segawa, who was a candidate for the State House of Representatives in a district in urban Honolulu who was accused, and as I understand it later convicted, of voter fraud.

He was accused of getting friends of his to sign up as voters resident in his district when in fact they were not, using a false address of an old folks' home.

Mr. Segawa at the time, as I understand it, was a student at the University of Hawaii Law School and his friends were rather young people for living in an old folks' home and it was rather quickly found out.

What happened was the Democratic voters in that district had the choice of a voting for a person who was then accused of an election-related felony, to which he was later convicted, or for a Republican.

The district voted Republican for the first time in recent memory, and I believe it is quite clear that the people did not vote for the Republican because they liked the Republican because he was promptly voted out of office in the next available election.

The people of that district had no opportunity -- I'm

speaking of the Democratic voters of that district. They had no opportunity to vote for someone that they wanted to be their representative in the State House of Representatives. Rather, they had to choose between the lesser of two evils, a problem that Lieutenant Governor Cayetano in his inaugural address rather eloquently spoke to when he promised the people of this state two things during his term of office as lieutenant governor, one, to enact legislation to provide for write-in voting and, two, to provide for a presidential primary, neither of which has come to pass, on the grounds that people should no longer be forced to choose between the lesser of two evils. That was his reference to the write-in vote matter as opposed to the presidential primary.

Q. Are you aware of any other problems that the prohibition on write-in voting might create?

A. Sure. I think there's an example, and I hope by discussing this I'm not affecting reality in the sense that I have at least affectation for Mr. Mataunaga, but --

MR. MICHAELS: We have of course a running objection to the relevance of this, but I'll let it go forward.

THE WITNESS: You do? You have a running objection to the relevance of this?

MS JOHNSTON: To his answer or to the question?

MR. MICHAELS: To the questions, but I have no problem with it going forward.

MS. JOHNSTON: Wait. You're objecting to the question that I just posed on the basis that it's not relevant?

MR. MICHAELS: Uh-huh.

THE WITNESS: Is that a yes?

MR. MICHAELS: Yes, that is a yes. I apologize for that.

THE WITNESS: Could you explain the basis of your objection of relevance, because perhaps my counsel would rephrase her question if you would clarify your relevance objection.

MR. MICHAELS: The question as we see it under the constitutional test is whether there is an undue burden on political choice, as stated in the Munro case.

If the state provides adequate primary opportunities, these other problems that you are talking about, assuming even if you have standing to raise them, which I doubt, are problems that the criminal process and ultimately the political process as it is constituted, unless of course we are instructed by the state courts otherwise, will take care of sufficiently to meet applicable legal standards.

That's the nature of the objection, and part of that I think I could deal with on redirect, but I have no objection of course to the witness answering the question.

THE WITNESS: I just want to say something as to the question that my counsel asked me and as I answered it, that your objection does not meet that question because I gave a specific instance of a real-life case. I did not give a hypothetical answer.

It was a situation in which it is quite clear -- and you've been asking me questions in the nature of what is my view as a political observer. I think it is quite clear to any political observer that the people of the House of Representative District who wanted to vote for a Democratic candidate were in effect disenfranchised. They were forced to vote for the Republican to keep an alleged felon out of the State House of Representative, and if they had voted for that person it would have taken probably a year for him to be impeached and removed because it took that long for him to be convicted of the charge of voter fraud, and they would have had in office for a least a year a person under accusation of a felony.

The alternative was a person they did not want but they found to be evidently the lesser of two evils. I do not think that your thesis that somehow easy access to the primary would be sufficient, because as I recall the situation did not come -- it was not exposed even before the primary. And even if it were, the period for people to file in the primary was past, and therefore the easy access excuse that you constantly use for denying me my right to cast write-in votes is totally irrelevant.

I think my counsel wanted to rephrase the question, without withdrawing the original question, without withdrawing the original answer.

MS. JOHNSTON: I'll rephrase it.

BY MS. JOHNSTON:

Q. Mr. Burdick, are you aware of ways in which the prohibition on write-in voting could unduly burden the political process, since that's what Mr. Michaels is interested in?

A. I think it unduly burdens the political process at any time that a voter is not free to cast his or her vote for whomever he wishes, whether or not that person is listed on the ballot.

Q. Well, in terms of problems that would unduly burden the political process arising from this ban on write-in voting.

MR. MICHAELS: You're asking for the opinion of the witness?

MS. JOHNSTON: Yes.

MR. MICHAELS: On the understanding that it's his opinion only, I have no objection to the question.

THE WITNESS: I think in the immediate future there's a potential problem, and I earlier said I was going to mention something about Senator Matsunaga, and I'm using his situation only as an example and I hope

that the hypothetical I mentioned does not come to pass.

There have been reports in the newspapers that Senator Matsunaga is not in very good health. He's over seventy years old.

It is conceivable that he could die or become ill before the primary. It is also conceivable that he could win the primary. He has opposition that is not expected to win.

Sometime after the primary he might become very ill and he could, for example, withdraw. The election code, if this statute is current, I believe it is Section 11-118, provides in the case of the death, withdrawal, of disqualification of any party candidate after filing -- presumably this applies after primaries as well -- the vacancy so caused may be filled by the appropriate committee of the party.

Now, let's say in this situation, and I'm sure it's correct, that there are a number of people who would gladly have made themselves candidates for the position in the United States Senate had Senator Matsunaga not chosen to run for reelection.

Let us assume that I enthusiastically -- let's say hypothetically that I am a Democrat and that I hypothetically am enthusiastically in favor of Senator Matsunaga but that in Senator Matsunaga's absence I would be enthusiastically in favor of candidate A.

Well, let us assume that the primary takes place, Senator Matsunaga wins the primary overwhelming, but shortly afterwards becomes ill and withdraws.

The appropriate committee of the Democrat party chooses Mr. B to be the party's candidate in the November election. I do not like Mr. B in my hypothetical and I am forced to choose between Mr. B., whom I do not like, or the Republican candidate, whom I do not like, or the Libertarian candidate, whom I do not like, that in a case like this I want to vote for candidate A and I am forbidden to do so by the current state of the election laws in this state, notwithstanding my constitutional right

to cast write-in votes.

I think that that is a very real danger. It is not within the realm of impossibility by any means. People would not be terribly surprised if this came to pass in this election this year.

Again, I hope it doesn't happen and I do not wish to express any opinion as to my desire to vote for or against Senator Matsunaga, but it is a very real possibility.

And that affects the United States Senate It's very interesting because approximately ??? not sure of the exact figure. I'm sure ????? able to get it -- somewhat less than one percent of the people who are registered voters in this state may cast absentee ballots overseas. Under a federal law they are entitled to cast write-in votes for candidates for federal office.

However, the ninety-nine percent plus of us registered voters in Hawaii who will not happen to be overseas on election day will not be allowed to do so, creating a rather absurd situation, in my view.

MS. JOHNSTON: Okay. Mr. Burdick, do you have any ideas as to how the prohibition on write-in voting not only creates undue burden on the political system but it could in fact subvert the political system?

MR. MICHAELS: Again, you're calling for the person's opinion?

MS. JOHNSTON: Correct.

MR. MICHAELS: This is a matter of course that will ultimately be decided by the court.

THE WITNESS: What will be decided by the court?

MR. MICHAELS: Whether there is an undue burden.

THE WITNESS: Yes. In 1986 I remember particularly -- I'm not sure whether it's happened this year -- there were at last two instances in which Democratic

candidates won a Democratic candidate for the State Senate by trying to disqualify his Republican opponent, after the filing deadline of course, on the grounds that one or two of the signatures on his petition were invalid and therefore there was an insufficient number of signatures on his petition and therefore he would be disqualified as a candidate and therefore the particular Democratic candidate would have no opposition in the general election, and since the particular Democratic candidate did not have any opposition in the primary, he was automatically elected because of lack of opposition. That occurred in at least two instances, as I say, in 1986.

As I understand it, and I'm not entirely sure because of the vagueness of the election laws here, I believe in a situation like that where the sole candidate of the party is disqualified, I'm not sure whether the party is able to pick a replacement candidate since the sole candidate had been disqualified for failure to meet the petition requirements.

In any event, even if the party committee, in this case the Republican party, had been able to put in stand-in candidates in those two elections, one in the State Senate and one in the State House of Representatives, it's clear that the candidate who was presumably the consensus candidate of the Republican party would be unable to be the candidate and that a perhaps reluctant candidate would have to be chosen, frustrating very much the desires of the Republican party in the instance, and I'm sure there are similar instances where this has worked against the Democratic candidate and against the Democratic party.

And I think that it is clear that situations like that tend to subvert the two-party system as well as of course frustrating the rights and desires of the electorate in those districts.

MS. JOHNSTON: I don't have any further questions.

EXAMINATION

BY MR. MICHAELS:

Q. Just to follow up on what was discussed on cross, do you recall the district in which Mr. Segawa was running, if he was the candidate that you were referring to in 1982?

A. It was one of the urban districts of Honolulu. I'm not sure whether it was the downtown district or Makiki or -- I believe it was the Makiki district, No. 28, but I'm not sure.

Q. Mr. Burdick, can you state for the record your address, your home address today and what it was in 1982?

A. Same, 144 Kapaa Street, Kailua. I was not in the district. I'm not making any claim that I was in that district. I certainly didn't register to vote in that district.

My point is that what happened to the people of that district could very well happen to me in my district, either in the State House of Representatives, the United States Senate, the United States House of Representatives, the governorship, or any other elected office. That's why I am seeking injunctive relief, so that I am protected in the future.

Q. Mr. Burdick, you're aware that there are provisions of law whereby a vacancy in office is filled following election; is that correct?

A. Following an election?

Q. Following an election. Let's take an example that I am familiar with in my home state of New York, where I was from originally.

When Senator Kennedy was assassinated there was an internal appointee made by then governor Rockefeller. Hawaii has statutes that would deal with that kind of a situation if, heaven forbid, anything similar would happen to any of our members of Congress. So--

A. I believe it applies to the United States Senate

but not to the United States House of Representatives.

Let's also recognize that a substantial number of members of the State Senate and State House of Representatives were appointed by Governor Waihee pursuant to provisions I believe in the State Constitution that allow him to fill vacancies in the State Legislature.

Q. And do you contend in this case that those provisions are unconstitutional notwithstanding the fact that you as a voter don't have the right to have any participation in the governor's decisions to make replacements?

MS. JOHNSTON: I just want to be sure I understand the question. You're asking whether either of the lawsuits in which he is being deposed today challenge the right of the governor to appoint a replacement candidate?

MR. MICHAELS: Challenge the governor in a situation where there is a resignation following election.

MS. JOHNSTON: You're asking is that part of this lawsuit?

BY MR. MICHAELS:

Q. Is it part of the lawsuit and would any of the theories that you're using in this lawsuit extend to the situation so that it would be unconstitutional for the governor without allowing anyone other than himself or herself, when this state elects a woman governor, to make the sole decision to appoint those replacements?

A. It is not within the scope of my current lawsuit. It is quite possible that judicial determinations that result from my lawsuit may have some effect on the issues that you've mentioned, but that is a matter of speculation, it's a matter of interpretation of law, and I don't see how it's relevant to my lawsuit. My lawsuit has to do with voters' rights when elections occur and not necessarily as to how frequently elections should take place or when special elections should take place.

Q. So you concede, therefore, at least for purposes of this lawsuit, that the state has the discretion to set the elections when it wants and to set special elections when it wants?

A. No, I don't.

Q. You don't. Okay. Do you know of any provision of state law that prohibits a person from filing more signatures than are minimally required in order to assure that the likelihood of being disqualified after you file your signatures is diminished?

MS. JOHNSTON: I'm going to object on the basis of relevancy. I'll also object that this is going beyond the three questions that I asked in the cross-examination.

MR. MICHAELS: If he can answer.

THE WITNESS: I'm not aware of what the statute says. I'm sure the statute will speak for itself.

MR. MICHAELS: That's all I have.

(Deposition concluded at 3:30 p.m.)

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[Certificate of Service Omitted in Printing]

[Portions of Plaintiff's Brief to the Hawaii Supreme Court (December 2, 1988), excerpted from "Exhibit S" to the Declaration of Steven S. Michaels (April 19, 1990) in Support of Defendants' Counter-Motion for Summary Judgment]

* * *

[Page 13]

The decisions in the cases discussed above hold that a ban on write-in voting is a denial of the right to vote freely in violation of the states' constitutions. Recent state court and federal court cases have viewed the denial of the right to write in as a violation also of the Federal Constitution's First and Fourteenth Amendment rights. (For a detailed discussion, see Robert Batey, "Electoral Graffiti: The Right to Write In," 5 Nova Law Journal 201 (1981).)

In *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983 (S.D. Ohio 1968), a three-judge panel took the position that to the extent the Ohio election laws deprived voters of their right to suffrage "either by denial of ballot position or effective write-in, they are unconstitutional and void." (290 F. Supp. at 990) The court rejected the arguments raised by the state that write-in candidates did not have a chance of winning and that write-in ballots presented administrative problems by stating:

> A blanket prohibition against the use of write-in ballots denies the qualified electors of Ohio the right to freely participate in the electoral process as guaranteed by the Constitution and violates the "equal protection" clause of the Fourteenth Amendment.
>
> *Id* at 987

A First Amendment as well as a Fourteenth Amendment analysis was used by the California Supreme Court in *Abdelnour*, 40 Cal. 3d 703, 701 P.2d 268, 221 Cal.

Rptr. 468 (1985), in holding that San Diego's ban on write-in voting affects both the right of a candidate to seek public office as well as the right of voters to cast votes for candidates of their choice. The court held that both rights "are of sufficient magnitude to warrant the protection of the First and Fourteenth Amendments and the comparable provisions of our State Constitution . . . ." (221 Cal. Rptr. at 475) In weighing the nature of the right to be protected by permitting the widest possible voting choice for electors, the court observed that a voter's priorities and interests might not be represented by anyone listed on the ballot and that regardless of whether candidates not listed on the ballot have a chance to win, "it is important in a free society that political diversity be given expression." *Id* at 476. The *Canaan* court, applying the "balancing test" set forth by the U.S. Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 708 (1983), weighed injuries to the would-be candidate and voter who cannot write in against the city's alleged interests and "Justifications"[4] for prohibiting the write-in and rejected every one of the city's arguments.

The *Canaan* court went even further in its analysis and rejected the city's contention that a voter is "not forced to vote for someone listed on the ballot" as a reason for refusing to calculate write-in votes. The court found that merely writing in a name without the counting of that name is constitutionally insufficient. Citing a Georgia case, *Thompson v. Wilson*, 223 Ga. 370, 155 S.E.

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[4] Some of the excuses advanced by the city and rejected by the court for not permitting write-in ballots were: 1) candidates must meet charter qualifications; 2) candidates must display willingness to serve; 3) the public should have adequate time to evaluate candidates' abilities; 4) candidates elected ought to receive a majority of the vote; 5) the scheme for electing the council will be interfered with. Many of these are the same arguments Defendants in *Burdick* raised in the Federal case, and which the District Court, applying *Anderson v. Celebrezze*, rejected.

2d 401 (1967), the court held:

> A right to "express Cone's] feelings" without legal effect, however, is antithetical to the fundamental nature of the right to vote. The First Amendment guarantees the right to *public* political expression. If the expression is so effectively muffled that no one can hear it, this guarantee is a hollow one. As this court has said in a slightly different context, "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or (the] right to pull a lever in a voting booth. . . . It also includes the right to have the vote counted at full value without dilution or discount." (citations omitted).

Canaan, supra 221 Cal. Rptr. at 477

It should be noted that there is not a single reported decision in which a state or federal court has squarely held that an across-the-board ban on write-in voting in all elections, as in Hawaii, is constitutionally acceptable. The reported cases on point alternately hold state laws prohibiting write-in voting violate the state constitution, or interpret laws that are silent on the issue as requiring construction that write-in voting is permitted to avoid constitutional problems. Additionally, many courts have held by way of dicta that voters have a constitutional right to write-in. (*Canaan v. Abdeulnour, supra*, 221 Cal. Rptr. at 482 fn. 22, lists 27 cases that speak to this issue, all of which support the right of voters to cast write-in votes.) Defendants herein can cite to no cases which support a position that a prohibition on write-in voting is constitutionally acceptable.

Defendants, in the Federal proceedings, have inappropriately relied on the Hawaii case *Jensen v. Turner*, 40 Haw. 604 (1954). In *Jensen*, the Court invalidated legislation passed by the 1949 legislative session which attempted to amend the Territorial election laws to permit write-in voting. The *Jensen* decision has no precedential authority for the question currently before this court as 1) the election laws the legislature sought to amend in 1949 have been supplanted by the current statute; and 2) the Supreme Court's voiding of the legislation was based on the fact that its form violated Section 45 of the Organic Act in that the title of the bill passed failed to include that it dealt with write-in voting. Indeed, the *Jensen* court specifically recognized that the issue of whether the United States constitution was violated by the ban on write-in ballots was *not* before the Court.

2. In construing Hawaii's Constitution, the Court Should Take Note of the Construction of Parallel Portions of the Federal Constitution.

The Constitutions of Hawaii and of the United States broadly provide for the right to vote, with the specifics as to the conduct of the elections to be spelled out by the legislature. The right to vote freely for a candidate of one's choice arises implicitly from the rights to freedom of speech and equal protection in parallel sections of the Hawaii and Federal Constitutions. Article I, Section 4 of the Hawaii Constitution tracks almost exactly the language of the First Amendment of the United States Constitution, and Article I, Section 5 tracks almost exactly the language of the Fourteenth Amendment to the United States Constitution. Additionally, the Hawaii constitution specifically adopts the United States Constitution "on behalf of the people of Hawaii."

Thus, this Court can look at interpretations of parallel portions of the U.S. Constitution to guide it in its interpretation of the Hawaii Constitution:

> [It is Hawaii Supreme Court's] obligation to interpret and enforce the state constitution

> as the highest court of this sovereign state and not in total disregard of federal interpretation of identical language but with reference to the wisdom of adopting these interpretations for our state.
> *Huihui v. Shimoda*, 64 Haw. 527, 531, 644 P. 2d 964 (1982)

During the Federal Court proceedings, Defendants conceded that the right Plaintiff asserted was a First Amendment right. Although the U.S. Supreme Court has never directly ruled on the issue of whether a ban on write-in voting is constitutional, the decisions by it in *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L.Ed. 2d 554 (1970), and *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), by implication adopt the principle that write-in voting is fundamental to the right of a voter to vote for a candidate of his or her choice.

In *Jenness*, *supra*, the Georgia statute under challenge was that which required that a candidate who did not enter and win a political party's primary could have his name printed on the ballot in the general election only if he filed a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question.

While *Jenness* is a ballot access case rather than a voters', rights case, it affirms the importance of the availability of write-in voting as contributing to a constitutionally sound statutory election scheme. The Supreme Court held that the burdens imposed on a candidate to have her name printed on the ballot did not render the election statute unconstitutional where, among other things, the election law did not prohibit write-in votes.

> It is to be noted that these procedures relate only to the right to have the name of a candidate or a nominee of a "political body" printed on the ballot. There is no limitation

> whatever, procedural or substantive, *on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.* (emphasis added)
> *Jenness*, *supra*, 29 L.Ed.2d at 588

That write-in voting is critical to the constitutional right of the voter to cast a vote for the candidate of his choice, is inherent in the Supreme Court's decision in *Williams v. Rhodes*, *supra*. There the Supreme Court invalidated the Ohio election scheme because the state's complicated regulations made impractical any alternative to the two major political parties. The court found that to comply with the First and Fourteenth Amendments, the state had to provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. Again, while this case is primarily a ballot access case rather than a voters' rights case, the court observed that

> The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.
> *Williams v. Rhodes*, *supra* 393 U.S. at 23

In analyzing the power of the state to impose restrictions on the right to vote, the *Williams* court points out that the Constitution prohibits restrictions on the basis of race or sex (Fifteenth and Nineteenth Amendments) and on the basis of a poll tax (Twenty-fourth Amendment):

> We therefore hold that no state can pass a law regulating elections that violate the Fourteenth Amendment's command that "no state shall . . . deny to any person . . . the equal protection of the laws."
> *Id.* 393 U.S. at 29

The relief given by the three-judge District Court to

the two minority political parties to "cure" the Ohio election statutes was to require that the election officials permit write-in voting which was banned by Ohio law. The ability to write in a candidate was seen by the Supreme Court as, at least, a partial remedy for the voters' inability to vote for a candidate from other than the two major parties.

One further case that indirectly supports the proposition that write-in voting is integral to freedom of choice by the voter is *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L.Ed.2d 714 (1974). In that case, the Supreme Court upheld that part of a three-judge District Court decision which had held constitutional a California law which precluded from being printed on the ballot the name of an independent candidate who had voted in a party primary or had a registered affiliation with a political party prior to the primary election. The Supreme Court, in holding the statute was not unconstitutional, states:

> Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law.
>
> *Stoner, supra*, 415 U.S. at 736, fn. 7

Plaintiff believes it is clear that, without directly addressing the precise question before this Court, the Supreme Court has spoken on the importance of the casting and counting of write-in votes. This Court in not being asked to consider whether Hawaii's law is constitutional under the Federal Constitution, as this question has been expressly reserved by stipulation for decision by the Federal Court, if necessary subsequent to this Court's answers to Certified Questions. (R. 27, at 3) Rather, Plaintiff asks the Court to take note of the construction of those parts of the Federal Constitution, specifically the First and Fourteenth Amendments which are virtually identical to sections of the Hawaii Constitution,

in providing its answers to the Certified Questions.

* * *

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VII. CONCLUSION

Plaintiff urges this Court to answer the three questions certified to it by the United States District Court in the way that will extend to Hawaii's residents the widest possible freedoms in voting for candidates of their choice, using write-in voting as a means of exercising this freedom. Defendants' position that write-in voting is not permitted by the Hawaii Constitution or Hawaii's election laws has no authority behind it as there is not a single legal authority Defendants can use to back up their position that a blanket ban on write-in voting in elections is constitutionally acceptable.

To date, Defendants have clouded the voters' rights issue by trying to contort ballot access cases into having some relevance. Plaintiff Burdick has not questioned a single statute, rule, or constitutional provision which regulates what candidates must do in order to have their names *printed* on a ballot. Plaintiff herein has challenged only the thus far successful efforts by the State to prevent voters in Hawaii from enjoying the same right to full choice of candidates that are offered to the voters in at least 47 other states.

Plaintiff respectfully asks the Court to guarantee that Hawaii voters will be able to exercise true freedom of choice in selecting who governs them.

DATED: Honolulu, Hawaii, December 2, 1988

s/s
MARY BLAINE JOHNSTON
Attorney for Plaintiff-Appellant

UNITED STATES DISTRICT COURT

DISTRICT OF Hawaii

ALAN B. BURDICK,

vs.

MORRIS TAKUSHI, et al.

ALAN B. BURDICK,

vs.

BENJAMIN CAYETANO, etc., et al.

Case Number: 86-0582 HMF
86-00365 HMF

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to xxxxx hearing before the Court. The issues have been xxxxx heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Summary Judgment is entered in favor of Plaintiff and against Defendants. IT IS FURTHER ORDERED that the Motion for Permanent Injunctive Relief is GRANTED.

cc: all counsel

MAY 15 1990 — Date

/s/ — Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Captions Omitted In Printing]

NOTICE OF APPEAL

Notice is hereby given that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (defendants above named in Civil No. 86-0582, consolidated with Civil No. 88-0365), and the Lieutenant Governor's successor, Benjamin Cayetano, Lieutenant Governor, State of Hawaii, hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay," entered in Nos. 86-0542 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Notice is also hereby given that Benjamin Cateyano, in his individual capacity, in his individual capacity as Lieutenant Governor of the State of Hawaii, and in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, Director of Elections of the State of Hawaii (defendants in Civil No. 88-0365, consolidated with Civil No. 86-0582), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion

for Stay," entered in Nos. 86-0582 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Dated: Honolulu, Hawaii, June 6, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
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Room 214, 425 Queen Street
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Attorneys for Defendants
in Civil Nos. 86-0587 and
88-0365-HMF (D. Haw.)

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Captions Omitted In Printing]

NOTICE OF APPEAL

Notice is hereby given that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (defendants above named in Civil No. 86-0582, consolidated with Civil No. 88-0365), and the Lieutenant Governor's successor, Benjamin Cateyano, Lieutenant Governor, State of Hawaii, hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay," entered in Nos. 86-0582 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Dated: Honolulu, Hawaii, June 12, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS

Deputy Attorneys General
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88-0365-HMF (D. Haw.)

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Captions Omitted In Printing]

NOTICE OF APPEAL

Notice is hereby given that Benjamin Cateyano, in his individual capacity, in his individual capacity as Lieutenant Governor of the State of Hawaii, and in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, Director of Elections of the State of Hawaii (defendants in Civil No. 88-0365, consolidated with Civil No. 86-0582), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay" entered in Nos. 86-0582 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Dated: Honolulu, Hawaii, June 12, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS

Deputy Attorneys General
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Room 214, 425 Queen Street
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88-0365-HMF (D. Haw.)

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	Nos. 90-15873
	)	90-15876
Plaintiff-Appellee,	)	90-15877
	)	
vs.	)	DC# CV-86-582
	)	-HMF
MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO in his capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of Elections of the State of Hawaii,	)	Hawaii
Defendants-Appellants.	)	

ORDER

Appellants' motion to consolidate appeal Nos. 90-15873, 90-15876, and 90-15877 is granted.

Appellants' motion to expedite these consolidated appeals is granted. The briefing schedule is as follows: appellants' opening brief and excerpts of record are due August 8, 1990, appellee's brief is due September 7, 1990, and the optional reply brief is due September 21, 1990.

These cases shall be accorded priority in hearing date pursuant to Ninth Cir. R. 34-3(3) and shall be

placed on the November 1990 Hawaii calendar.

Appellants have advised that the reporter's transcripts have been prepared and filed. If the certificate of record has not been issued, the district court shall do so at its earliest convenience.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

s/s
Adrienne H. Hickman
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-15873
CT/AG#: CV-86-0582-HMF
CT/AG#: CV-88-0365-HMF

ALAN B. BURDICK

Plaintiff-Appellee

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, Ltd., in his capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of the State of Hawaii

Defendants-Appellants

NO. 90-15876
CT/AG#: CV-86-0582-HMF

ALAN B. BURDICK

Plaintiff-Appellee

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii

Defendant-Appellant

NO. 90-15877
CT/AG#: CV-88-0365-HMF

ALAN B. BURDICK

Plaintiff-Appellee

v.

BENJAMIN CAYETANO, Ltd., in his capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of Elections of the State of Hawaii

Defendant-Appellant

APPEAL FROM the United States District Court for the U.S. District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED.

Filed and entered 28 June 1991.